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The Non-Deterioration Obligation in the Nature Restoration Regulation – a Necessary and Proportionate Addition to the Habitats Directive or a Monstrosity with Disastrous Consequences for Society?

Bente J. de Leeuw

Student of State and Administrative Law & Law and Sustainability in Europe, University of Utrecht, Utrecht, The Netherlands
b.j.deleeuw@uu.nl

Chris W. Backes

Professor of Environmental and Planning Law, University of Utrecht, Utrecht, The Netherlands
Corresponding Author
c.w.backes@uu.nl

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Abstract

On June 22, 2022, the European Commission proposed a nature restoration regulation with the aim of restoring degraded ecosystems across the EU by 2050. Under the proposal, Member States must prepare national restoration plans to meet various ecosystem-specific targets and obligations. Controversial is the non-deterioration obligation that will apply in areas where restoration measures are taken and in areas where certain habitat types occur. After the European Parliament (EP) and the European (Environment) Council had both adopted positions that include significant amendments of the non-deterioration provisions, in November 2023 the Council announced a compromise text as the result of the trilogue. This contribution assesses how the compromise text of the non-deterioration obligation addresses drawbacks from the previous proposals, identifies associated questions and offers some suggestions for the interpretation.

Keywords

nature restoration regulation – non-deterioration obligation – nature protection law – habitat directive – environment

1 Introduction¹

To halt the loss of biodiversity and ensure the restoration of nature in the European Union, the European Commission has proposed a regulation on nature restoration.² The proposal has caused a political divide: on the one hand, it is seen as a great opportunity to bring nature back to Europe, for the benefit of biodiversity, climate, and people;³ on the other hand, it has led to strong opposition. The Dutch House of Representatives has been highly critical, demanding that the government continued to actively oppose the regulation.⁴ Particularly, there were concerns about the ‘non-deterioration obligation’ that is part of the regulation, because of possible ‘disastrous legal consequences for housing, infrastructure and energy transition’.⁵ There were fears of taking on new obligations that will further put a ‘lock’ on (activities in) the Netherlands.⁶ That is why the Dutch government, as one of a few Member States, voted against the provisional agreement within the (Environment) Council on the regulation.⁷

In several respects, the proposal voted on by the European Council constituted a significant weakening of the Commission’s proposal, but at the same time it clarified other aspects.⁸ In the European Council on June

1 A Dutch version of this article has been published in *Nederlands Tijdschrift voor Europees Recht*. 2023 7/8, 142-150.

2 Commission Proposal for a Regulation of the European Parliament and of the Council on nature restoration, COM (2022) 304 final.

3 *BirdLife*, *ClientEarth*, *EEB* and *WWF*, Proposal for a regulation on nature restoration, NGO analysis 2022.

4 Document of Dutch House of Representatives II 2022/21 501-32 No. 1537, the vote can be found at <https://www.tweedekamer.nl/kamerstukken/moties/detail?id=2023Z07344&did=2023D17229>, last accessed Aug. 10, 2023.

5 Document of Dutch House of Representatives II 2022/21 501-32 No. 1537.

6 *Y. Vugts & R. Ockhuijsen*, ‘Kabinet vreest nieuwe natuurplannen van EU, bouw mogelijk nog meer ‘op slot’” *NOS*, April 24, 2023.

7 See Environment Council vote of 20 June, <https://video.consilium.europa.eu/event/en/26904>.

8 Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on nature restoration – General approach, ST 10867 2023 INIT, EUR-Lex - ST_10867_2023_INIT - EN - EUR-Lex (europa.eu), last accessed Aug. 1, 2023.

20 2023, a large majority of the 27 Member States backed this proposal from the Swedish presidency. The European Parliament determined its position on the Commission's proposal by a narrow majority on July 10. In doing so, it adopted a large number of amendments. As a result, the final (consolidated) text voted on by Parliament was from a legal perspective an even weaker and less far-reaching version than the one the Council agreed on.⁹ On 11 November a compromise was reached as a result of the trilogue,¹⁰ on which the Council and Parliament will have to vote again.

This contribution aims to explain the background and content of the proposed regulation. We will concentrate on the non-deterioration obligation. We will assess to which extent the current compromise text avoids the drawbacks of the other proposals and which questions it poses. We also will do some suggestions on how the non-deterioration obligation, as proposed after the trilogue, should be interpreted. Our starting point will be the text of the 'compromise text', published end of November 2023. Where relevant, however, we will indicate how this proposal relates to the earlier versions of the regulation.¹¹

2 The Proposal for a Regulation on Nature Restoration

2.1 *Background and Introduction to the Commission's Proposal*

The proposal for a nature restoration regulation is prompted by the loss of biodiversity and the degradation of ecosystems. Worldwide, 75 % of the land surface and 66 % of the ocean have been occupied, degraded, or even destroyed by human activity.¹² The degradation of nature has put about 1 million animal and plant species at risk of extinction and has reduced the population size of wildlife worldwide by an average of 69 % since 1970.¹³ Biodiversity loss is one of the nine planetary boundaries we have already more than exceeded,

9 European Parliament, Procedure: 2022/0195(COD), Amendments adopted by the European Parliament on 12 July 2023(1) on the Proposal for a Regulation of the European Parliament and of the Council on nature restoration, last accessed Aug. 1, 2023.

10 Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on nature restoration, 15907/23, 22 November 2023.

11 *NRL_Text_November2023_en.pdf* (arc2020.eu).

12 *The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES)*, Summary for Policymakers of the Global Assessment Report On Biodiversity And Ecosystem Services Of The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, IPBES secretariat, Bonn 2019, p. 11.

13 *R.E.A. Almond et al.*, Living Planet Report 2022 – Building a Nature Positive Society. World Wide Fund for Nature (wwf), Gland, Switzerland 2022, p. 4.

and this threatens our own survival.¹⁴ After all, healthy ecosystems regulate our climate, provide us with food, clean the air we breathe and the water we drink.¹⁵

At the international level, the United Nations has declared the current decade ‘the Decade of Ecosystem Restoration,’¹⁶ and explicit nature restoration targets have been included in global treaties.¹⁷ However, the international Aichi target and the European target in the 2020 Biodiversity Strategy to restore 15 % of degraded nature by 2020, were both not met, nor were the other biodiversity targets.¹⁸ Existing EU legislation appears to fall short of what is needed to halt biodiversity decline and provide a real incentive for Member States to restore nature.¹⁹ Already in the 1990s, the Natura 2000 network was created under the European Birds and Habitats Directives, with the aim to safeguard biological diversity on European territory.²⁰ While these protected Natura 2000 sites should be in excellent condition, 81 % of the habitats currently have a poor conservation status.²¹

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- 14 J. Rockström et al., *A Safe Operating Space for Humanity*, *Nature* vol. 461 2009 pp. 472–475. W. Steffen et al., *Planetary boundaries: Guiding Human Development on a Changing Planet*, *Science* vol. 347(6223) 2015 pp. 736–747.
- 15 *The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES)*, Summary for Policymakers of the Global Assessment Report On Biodiversity And Ecosystem Services Of The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, IPBES secretariat, Bonn 2019. p. 10.
- 16 via: www.decadeonrestoration.org/about-un-decade
- 17 See more deeply Telesetsky, A, Cliquet, A & Akhtar-Khavari, A, *Ecological Restoration in International Environmental Law*, Routledge, 2017.
- 18 via: www.cbd.int/sp/targets/ The Aichi targets were adopted at the CBD Summit of the UN Convention in Nagoya in 2010. Commission Communication, EU Biodiversity Strategy for 2030 – Bringing Nature Back into Our Lives, com(2020) 380 final. *The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES)*, Summary for Policymakers of the Global Assessment Report On Biodiversity And Ecosystem Services Of The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, IPBES secretariat, Bonn 2019. p. 15 & 33–35. *European Environment Agency (EEA)*, Midterm review EU Biodiversity strategy for 2020, EU assessment of progress towards the targets and actions via: <http://www.eea.europa.eu>. See also *WWF*, EU Time is up EU falls far short of 2020 biodiversity targets, EEA report shows, October 19, 2020 via: <https://www.wwf.eu>.
- 19 Commission Communication, EU Biodiversity Strategy for 2030 – Bringing Nature Back into Our Lives, com(2020) 380 final.
- 20 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.
- 21 *European Environment Agency (EEA)*, State of nature in the EU, Results from reporting under the nature directives 2013–2018, 2020. p. 5 & 41.

To strengthen the legal framework for nature restoration, the Commission announced legally binding targets in its 2030 EU Biodiversity Strategy.²² On June 22, 2022, as part of the EU Biodiversity Strategy (which is part of the Green Deal), the proposal for a regulation on nature restoration was published (the proposal).²³ The proposal aims to complement the existing obligations under the Birds and Habitats Directives, and also other directives such as the Water Framework Directive, and to encourage and facilitate Member States to meet the existing obligations and achieve the goals of these Directives.²⁴ The proposal also builds on international agreements such as the Paris Agreement and the Biodiversity Convention.

The specific goal of the regulation is that degraded ecosystems across the EU should be restored. Habitat area in good condition for habitat types listed in Annex I should increase until at least 90 % is in good condition and until the 'favourable reference area' for each habitat type in each biogeographic region of the Member State concerned is ensured.²⁵ The regulation does not mention a date when this aim has to be realized. However, it sets deadlines to take restoration measures. Nature restoration measures must be in place for at least 30 % of degraded land and marine areas of the EU by 2030,²⁶ and for all ecosystems in need of restoration by 2050. To achieve this, the proposal sets multiple restoration-oriented binding targets and obligations for different ecosystems. The proposal includes obligations for nature restoration in six specific ecosystems: terrestrial, coastal, and freshwater systems, marine ecosystems, urban ecosystems, rivers and related floodplains, agricultural ecosystems and forest ecosystems. In addition, Article 8 urges the Member States to improve pollinator diversity and reverse the decline of pollinator populations at the latest by 2030 and achieve thereafter an increasing trend of pollinator populations.²⁷

The proposal consists of two elements, differing in background, character, and goals. First, new restoration targets and obligations are created for ecosystems and areas not covered by existing EU legislation. For the first time, legally binding biodiversity targets have been set for the urban environment

22 Commission Communication, EU Biodiversity Strategy for 2030 – Bringing Nature Back into Our Lives, COM(2020) 380 final. The EU biodiversity strategy is part of the Green Deal.

23 Commission Proposal for a Regulation of the European Parliament and of the Council on nature restoration, COM (2022) 304 final.

24 Explanatory Memorandum Commission Proposal for a Regulation of the European Parliament and of the Council on nature restoration, COM (2022) 304 final.

25 See for example article 4 (10) compromise text.

26 See article 4 (1) compromise text.

27 Article 1(2) Commission Proposal for a Regulation of the European Parliament and of the Council on nature restoration, COM (2022) 304 final.

and for the agricultural landscape. Second, it complements the Habitats and Birds Directives by setting deadlines for meeting targets and concrete legal obligations to restore ecosystems outside the Natura 2000 network as well.

3 Content

Articles 1, 2 and 3 of the proposal define the objective, geographical scope and key definitions. Article 4 defines the targets for restoration measures for terrestrial, coastal and freshwater ecosystems. The targets are time-bound obligations and relate to site restoration and species habitat restoration. Article 4 provides quantitative targets for taking restoration measures by 2030, by 2040 and by 2050. Article 5 imposes similar obligations on marine ecosystems. Articles 4 and 5 also comprise non-deterioration obligations, which will be discussed in detail below. Articles 6 to 10 specify further additional targets and obligations for a variety of ecosystem-specific measures. For example, targets are set for increasing green urban areas, removing unnecessary barriers in rivers, reversing the decline in the number of pollinating insects, and improving the biodiversity of agricultural and forest ecosystems.

The proposal sets the targets, deadlines and some obligations but does not dictate to Member States where and how they should meet the targets. Pursuant to Articles 11 to 15, Member States shall develop their own national restoration plans that describe, *inter alia*, the areas to be restored and the recovery measures that will be taken to meet ecosystem-specific targets and obligations. The national restoration plans allow Member States to make their own choices and to take into account the specific circumstances and particular needs on their own territory. Member States will submit the plans to the Commission, which will then assess their adequacy and effectiveness.

4 Existing Obligations

Before discussing the non-deterioration obligation further, it is important to briefly consider the relationship between the proposal and existing EU nature legislation, more specifically the Birds and Habitats Directives. After all, the proposal is intended to complement existing environmental policy and aims to cooperate with and reinforce existing EU environmental legislation.²⁸ The

²⁸ Commission Proposal for a Regulation of the European Parliament and of the Council on nature restoration, COM (2022) 304 final.

Commission has rightfully pointed out that existing EU legislation already requires Member States to restore nature and prevent further deterioration.²⁹ Not only does this apply to habitats within Natura 2000 sites as designated under both directives, but also outside these sites.

Under Article 2, the overall aim of the Habitats Directive is to achieve favourable conservation status for habitats and species of EU interest.³⁰ The Habitats Directive is not only aimed at protecting Natura 2000 sites, but its objective of ensuring biological diversity extends to the European territory as a whole.³¹ The Natura 2000 network is mandatory as the primary measure to achieve the favourable conservation status for habitats and species. Other than that, Member States are free to meet the objective at their own discretion.³² They are expected to take 'all necessary measures' to achieve and maintain the favourable conservation status.³³ The obligations outside Natura 2000 sites, for example, in buffer zones around and ecological corridors between the sites, are mentioned several times in the directive (see, for example, Article 10 of the Habitats Directive), but not elaborated upon.

Furthermore, under Article 6(1) of the Habitats Directive Member States are obligated to take measures in Natura 2000 sites to achieve the site's conservation objectives. Each site's specific objectives must contribute to achieving, maintaining, or restoring the favourable conservation status of the species and habitats to be protected.³⁴ This is an obligation of result, but it is up to the Member States to determine how and at what rate this is to be achieved and what the contribution of each site to achieving a favourable conservation status should be.³⁵ For some sites in the Netherlands, only the maintenance of the conservation status has been established as a conservation objective for

29 Commission Communication, EU Biodiversity Strategy for 2030 – Bringing Nature Back into Our Lives, com(2020) 380 final.

30 *European Commission*, Assessment, monitoring and reporting of conservation status – Preparing the 2001–2007 report under Article 17 of the Habitats Directive, COM(2005)04-03/03, p. 5 e.v.

31 Article 2(2) Habitats Directive

32 *European Commission*, Commission Note on the Designation of Special Areas of Conservation (SACS), May 14, 2012, p. 2. C.W. Backes, M.A. Poortinga & H.E. Woldendorp, 'Natuurbescherming in de Natuurwet: kop eraf', in: N. Teesing (ed.), *Natuur (lijk) met recht beschermd: bouwstenen voor hanteerbare natuurbescherming* 2010, p. 30.

33 *European Commission*, Assessment, monitoring and reporting of conservation status – Preparing the 2001–2007 report under Article 17 of the Habitats Directive, COM(2005)04-03/03, p. 4.

34 Article 6(1) Habitats Directive. *European Commission*, Management of Natura 2000 sites. The provisions of Article 6 of the Habitats Directive (92/43/EEC) COM(2018)7621, 2018.

35 Also confirmed by the Dutch Council of State in ABRvS 29 May 2019 ECLI:NL:RVS:2019:1603 para. 13.3 and ABRvS 17 May 2017 ECLI:NL:RVS:2017:1259 para. 8.2.

the habitats and species to be protected. At other sites, some of the habitats and species are also subject to restoration and expansion objectives.

The concept of favourable conservation status constitutes the general objective to be achieved for all habitat types and species of interest to the EU. However, the concept of favourable conservation status is not limited to the Natura 2000 network alone. The overall situation of habitats and species must be considered in order to assess whether the status of a habitat type or species in Member States is favourable or not.³⁶ For example, in the Netherlands, only a few species are found exclusively within Natura 2000 areas, so the vast majority depend on the status of areas outside Natura 2000 sites.³⁷ Moreover, ecological research shows that habitat reduction and fragmentation are the main obstacles to achieving the favourable conservation status of habitat types and species in the Netherlands.³⁸ This suggests that (for some habitat types and species) to achieve favourable conservation status, it is not sufficient to protect only the designated Natura 2000 sites. The obligation to take ‘all necessary measures’ implies that Member States are also required to take (restoration) measures outside Natura 2000 by, for example, the maintenance and restoration of sufficient areas in the wider environment.

In addition, under Article 6(2) Habitats Directive, Member States are obliged to take ‘appropriate measures’ to prevent the deterioration of the conservation status of protected habitat types and significant disturbance of species.³⁹ The EU Court of Justice has emphasized that this is an obligation of result.⁴⁰ Regardless of what measures a Member State has taken, it is considered a

36 *European Commission*, Assessment, monitoring and reporting of conservation status – Preparing the 2001–2007 report under Article 17 of the Habitats Directive, COM(2005)04-03/03, p. 4. See *A. Cliquet*, International and European Law on Protected Areas and Climate Change: Need for Adaptation or Implementation?, *Environmental Management* 2014, p. 727.

37 BNC fiche sent to the House of Representatives on the draft Nature Restoration Regulation (annex to Kamerstukken 22 112 en 33 576, nr. 3530), October 14 2022

38 *Adams et al.* Vogel- en Habitatrichtlijnrapportage 2019. Wageningen: Wageningen University & Research. 2020, p. 8, 23. *M.E. Sanders et al.*, Nederlands natuurbeleid in internationale context. Voortgang realisatie natuur- en biodiversiteitsbeleid, Den Haag: Planbureau voor de Leefomgeving (PBL) 2020, p. 50.

39 Article 6(2) Habitats Directive. *European Commission*, Management of Natura 2000 sites. The provisions of Article 6 of the Habitats Directive (92/43/EEC) COM(2018)7621, 2018.

40 See, for example, Case C-117/00, *Commission v Ireland* [2002], cf *Verschuuren*, para. 32 et seq. And C-96/98, *Commission v France* [1999], para. 35.

violation of Article 6(2) if deterioration of a habitat type or disturbance of species occurs.⁴¹

Considering the existing obligations under the Habitats Directive, the proposal for the Nature Restoration Regulation is less groundbreaking than it may seem at first glance. While this is true with respect to the obligation to take restoration measures within Natura 2000 sites, it is also true with respect to taking measures outside them. To a large extent, the proposal can be seen as an operationalization of the already existing obligations under the Habitats Directive. The proposal prescribes and specifies where and when restoration measures should be taken in order to gradually improve and restore the condition of protected habitat types, and to reach the favourable reference area that is necessary to achieve a favourable conservation status of those habitat types in the Union.⁴² For example, under Article 4(1), by 2030, Member States shall put in place restoration measures on 30 % of the area of each group of habitat types listed in Annex I which are not in good condition, to improve these sites to good condition. By 2040, restoration measures must be taken at least 60 % and by 2050 at least 90 % of the area. However, the proposal does not prescribe when the 'favourable conservation status' (Article 3(1) Habitats Directive), respectively the 'good condition' (Article 4(10) Nature Restoration Regulation) should be realized.

While the Habitats Directive thus established what the goal is and that 'all necessary measures' should be taken to achieve it, the Nature Restoration Regulation further specifies how the goal can be achieved by setting targets as well as deadlines to take restoration measures. What the Habitats Directive lacked were concrete targets and instructions for restoration within and outside Natura 2000. The Nature Restoration Regulation aims to address these shortcomings.⁴³

41 Case C-117/00, *Commission v Ireland* [2002], cf. Verschuuren. See A. Trouwborst & F. Fleurke, *Kolencentrales, robuuste verbindingen en EU-milieurichtlijnen: balanceren tussen nationale en Europese doelstellingen*, NtEr nr. 3 2011, p. 101. H.M. Dotinga & A. Trouwborst, *Juridische bescherming van biodiversiteit in de Noordzee Internationaal, Europees en Nederlands recht*, CELP/NILOS 2008, p. 82.

42 Explanatory Memorandum Commission Proposal for a Regulation of the European Parliament and of the Council on nature restoration, COM (2022) 304 final.

43 Explanatory Memorandum Commission Proposal for a Regulation of the European Parliament and of the Council on nature restoration, COM (2022) 304 final.

5 Non-Deterioration Obligations

The (Dutch) debate has focused on one component of the proposal in particular: the non-deterioration obligation. According to this obligation, protected habitat types and habitats of protected species may not deteriorate, both inside and outside Natura 2000 areas. How exactly does the obligation work? Article 4 requires Member States to take restoration measures to restore terrestrial, coastal and freshwater ecosystems.⁴⁴ Article 4(1), (1a) and (1b) concern restoration measures to improve areas where protected habitat types (of Annex 1) already occur, Article 4(2), (2a) and (2b) relate to the re-establishment of protected habitat types in areas where they do *not* occur, and Article 4(3) aims to restore habitats where protected species of the Habitats and Birds Directives occur. Article 4(6), (7) and (7a) subsequently deal with two different variations of a non-deterioration obligation. In the compromise text, these articles read as follows (all emphasizes in bold made by the authors):

6. Member States shall put in place measures which shall **aim to ensure** that the **areas that are subject to restoration measures** in accordance with paragraphs 1, 2 and 3 show a **continuous improvement** in the condition of the habitat types listed in Annex 1 until good condition is reached, and a continuous improvement of the quality of the habitats of the species referred to in paragraph 3, until the sufficient quality of those habitats is reached. Without prejudice to Directive 92/43/EEC, Member States shall put in place measures which shall aim to ensure that areas in which good condition has been reached, and in which the sufficient quality of the habitats of the species has been reached, do not **significantly deteriorate**.

7. Without prejudice to Directive 92/43/EEC, Member States shall, no later than by the date of publication of their national restoration plans in accordance with Article 14(6), **endeavour to put in place necessary measures with the aim to prevent significant deterioration** of areas where the habitat types listed in Annex 1 occur, which are in good condition or are necessary to achieve the **restoration targets set out in paragraph 10**.

44 From a practical point of view, we only cover the non-deterioration obligation in Article 4, but the one in Article 5 corresponds to it and has exactly the same wording. Article 5 deals with the restoration of marine ecosystems.

The non-deterioration obligation in Article 4(6) states that the measures put in place shall aim to ensure that the areas show a ‘continuous improvement’ in the condition of habitat types and the quality of the habitats of species, until sufficient condition and quality is reached. As well as that, the measures shall aim to ensure that the areas that have reached the sufficient condition and quality, do not significantly deteriorate. Depending on where restoration measures are to be taken, the non-deterioration obligation would apply in areas that can be either inside or outside the Natura 2000 network. This is relevant because a non-deterioration obligation already exists within Natura 2000 sites. Thus, for habitats within Natura 2000 sites, this appears to be merely a reaffirmation of existing obligations under Article 6(2) of the Habitats Directive.⁴⁵ In any case, this non-deterioration obligation would only come into effect once restoration measures have been taken.⁴⁶ This gives Member States, unlike Article 4(7), some control over where the non-deterioration obligation will apply. Article 4(6) is quite similar to the Commission’s proposal, except for the addition of the words ‘significantly’ and ‘shall aim to.’

Article 4(7) has been weakened by the addition of ‘shall endeavour’ and has now been linked to the areas which are in good condition or are necessary to achieve the restoration targets in paragraph 10. Paragraph 10 sets restoration targets. More especially, it requires Member State to ensure an ‘increase of habitat area in good condition for habitat types listed Annex I until at least 90 % is in good condition and until the favourable reference area for each habitat type in each biogeographic region of the Member State concerned is reached’. Furthermore, Member States have to ensure an ‘increasing trend’ towards the sufficient quantity and quality of habitats and species referred to in the annexes of the Habitats and the Birds Directives. Therefore, the non-deterioration obligation is also linked to the areas which are in good condition or are necessary to achieve the increase of habitat area until at least 90 % is in good condition and until the favourable reference area for each habitat type is reached. Article 4(7) is broader than Article 4(6) because unlike Article 4(6), it is not necessary that restoration measures have already been put in place in the sites.⁴⁷ Since Article 4(7) is linked to the areas which are in good condition or are needed to achieve the restoration targets in paragraph 10, the obligation also covers areas that have not been designated as Natura 2000 sites.

Article 4(8) and (9) concern the exceptions to the non-deterioration obligation. First, deterioration can be justified by force majeure or if it is a

45 See in more detail paragraph 6.5.

46 See in more detail paragraph 6.3.

47 See in more detail paragraph 6.3.

direct consequence of climate change. Within Natura 2000 sites, deterioration is additionally justified for projects and plans that pass the habitat test in Article 6(4) of the Habitats Directive. Outside Natura 2000 sites, deterioration is justified by passing a similar test: there is a project of overriding public interest for which no less damaging alternative solutions are available, to be determined on a case-by-case basis.

Paragraph 7a allows to apply the non-deterioration requirement outside Natura 2000-areas for habitats only at the level of their territory, 'in the absence of alternatives'. Article 4(8), 4(8a) and 4(9) allow to derogate from the non-deterioration obligations under certain circumstances, for example force majeure or if an unavoidable habitat transformation is 'directly caused by climate change'. Within Natura 2000 sites, deterioration is additionally justified for projects and plans that pass the habitat test in Article 6(4) of the Habitats Directive. Outside Natura 2000 sites, deterioration is justified by passing a similar test: there is a project of overriding public interest for which no less damaging alternative solutions are available, to be determined on a case-by-case basis. Finally, outside Natura 2000 sites deterioration is justified when it is caused by action or inaction from third countries for which the Member State concerned is not responsible.

Compared to the original Commission's proposal, this compromise text has been watered down substantially. To some extent, it clarifies some questions the original proposal raised. However, it also prompts new questions, which will be discussed in the next paragraph.

6 Discussion of Some Issues in More Detail

6.1 *Best-Effort Obligation*

Both paragraph 6 and 7 do not prescribe a result that must be reached (or prevented), but require the Member States to take measures that aim at non-deterioration. Hence, different from the original proposal of the Commission, the non-deterioration obligation is a best-effort obligation only. This is regrettable as it may substantially diminish its effectiveness and enforceability. It also undermines the safeguard function and certainty of the national restoration plans. According to the explanatory memorandum of the Commission proposal, the non-deterioration obligation is essential in order not to further increase current restoration needs.⁴⁸ Several authors also argue

⁴⁸ Commission Proposal for a Regulation of the European Parliament and of the Council on nature restoration, COM(2022) 304 final.

that the regulation without a strong non-deterioration obligation would be ineffective because, after all, Member States would invest in restoration, but the regulation would also allow nature to (further) deteriorate before or after the investment has been made.⁴⁹ As a result, investments in restoration measures that have been made or are being made, would be at risk of being nullified or ineffective. It is not efficient to make these investments and then allow the resulting quality of nature to deteriorate significantly again afterwards.

Also, for assessing restoration needs in the national restoration plans, a starting point is needed, that is a certain quality of habitats in areas where they are to be improved. If that starting point, being the condition of the habitat types to be protected at that particular time, subsequently changes and the condition deteriorates significantly, the national restoration plans are no longer correct either. Therefore, a non-deterioration obligation of habitats in areas which, according to the national recovery plan, are needed to expand or improve the habitats present there, is necessary for and a logical addition to the national restoration plans.

The compromise text focuses on measures to prevent deterioration, not the result that any deterioration is forbidden. It therefore seems to prevent that, comparable to Article 6(3) Habitats Directive, all kind of new activities can be blocked simply because it cannot be fully ascertained that a certain activity will not, in cumulation with other activities and the existing ecological status of an area, contribute to deterioration. Therefore, the non-deterioration clauses will not imply an 'Article 6 (3) Habitats Directive-test', neither directly, nor indirectly. Stakeholders, like NGO's, who want to force authorities to take action in order to stop deterioration of areas will have to prove that the measures taken are insufficient to avoid deterioration. It requires authorities to substantiate, for example in their national plans according to Article 11 ff, how they will stop deterioration of the habitats concerned and how they will avoid future deterioration. If it can be proven that the measures taken and proposed are insufficient to avoid deterioration, courts still seem to be able to force authorities to improve their plans and the actual measures they take. It will not be sufficient for authorities to simply refer to the fact that their

49 *Society for Ecological Restoration*, Misconceptions about the Nature Restoration Law debunked by the SER Europe Legal Working Group (webinar), June 7 2023, available at: www.ser.org. SERE Legal Working Group, The EU Nature Restoration Law: Providing legal certainty in tackling the biodiversity and climate crisis, May 2023, p. 2; *Vreeken*, *Opinie: De Europese Natuurherstelwet haalt Nederland juist van het slot*, *De Volkskrant*, May 15, 2023. *Schoukens, Cliquet & Decler*, *De Europese Natuurherstelwet sluit nauw aan bij het Vlaamse natuur- en milieubeleid. Alleen durft niemand dat luidop te zeggen*, *Knack*, May 12, 2023.

measures aim at prevention of deterioration. 'Measures that aim to' seems to refer both to the intention of the authorities as to the (objective) suitability and appropriateness of the measures for the aim to prevent deterioration. Based on this interpretation, the non-deterioration obligations would still have some teeth and would be enforceable in cases of clear insufficient action. However, the compromise text is considerably weakened, especially regarding its enforceability and its safeguard function is no longer fully guaranteed. This is even more true when taking into account the new derogation of Article 4(7a) which will be dealt with in the next paragraph.

6.2 *Derogation: Territorial Wide Application (Paragraph 7a)*

Paragraph 7a was added to Article 4 in the compromise text. It enables Member States to apply the non-deterioration requirements of paragraphs 6 and 7 outside Natura 2000-areas only with regard to the respective habitats on their whole territory and hence to a certain extent allows 'balancing' improvements and losses of habitats in different areas within the same biogeographic region on their territory. However, if a Member State wants to make use of this flexibility, it has to notify the wish to do so to the Commission. Furthermore, application of paragraph 7a is only allowed 'in absence of alternatives'. This seems to mean that deterioration of some habitats in some areas must be unavoidable and cannot be justified by applying the derogations offered in paragraphs 8, 8a and 9 of the compromise text. It will not be easy to prove that these conditions are fulfilled. Besides this, territorial application of the non-deterioration requirement implies a close and cohesive monitoring of all protected habitat types in all areas (outside Natura 2000-areas) within a Member State. All in all, the derogation of paragraph 7a can further water down the non-deterioration requirement. However, it is not easy and laborious to meet the conditions allowing to make use of this possibility.

6.3 *Reference Area*

Article 4 (6, first sentence) applies to the areas 'that are subject to restoration measures' in accordance with paragraphs 1, 2 and 3 of Article 4. These paragraphs describe which kind of restoration measures are to be taken (for example paragraph 1, first sentence). Subsequently, the paragraphs 1 and 2 prescribe a timeframe until when these measures have to be taken. The non-deterioration clause of 4(6, first sentence) could theoretically be read as referring to all areas where, during the following decades until 2050, measures will have to be taken and not only to the areas where measures are already taken or are to be taken within a certain period. However, such an extensive interpretation is not likely. Article 4 (6) requires the Member States to aim at a 'continuous

improvement in the condition of the habitat'. It does not make much sense to prescribe a detailed timeline where in some of the areas Member States may wait until 2040 or even 2040 before they take any restoration measures and apply the non-deterioration clause immediately to all areas where in the decades to come, measures should be taken. Moreover, paragraph 6 has to be read in relation to paragraph 7. Whilst paragraph 7 tries to ensure that all areas where, according to the Member States' plans in the future restoration measures will be needed, do not deteriorate (see hereafter), paragraph 6 has a different aim. It mainly aims to ensure that Member States do not stop improving after having taking some measures but take measures to ensure a continuous improvement.⁵⁰ The different aims and, linked to this, the different reference areas, are also reflected in consideration 35 of the regulation, where the first sentence refers to Article 4 (6) and the second sentence to Article 4 (7). Therefore, paragraph 6 seems to apply only to areas where restoration measures have been or currently are taken.

The non-deterioration requirement in Article 4(7) is linked to areas where the habitats of Annex I occur, and which are either already in a good condition or are necessary to realize the targets mentioned in Article 4(10). A previously proposed text version from the Council raised questions because it related the non-deterioration obligation also to the requirement to take restoration measures on 90 % of the area of each Annex I group of habitat types that is not in good condition by 2050. This seemed to imply that the non-deterioration obligation would only apply to 90 % of the total area of habitat type that is not in good condition. This would mean that for 10 % the habitats that are not in a favourable condition no measures are required that aim at preventing deterioration, regardless of whether measures are ultimately needed there to achieve a favourable reference area and favourable conservation status of the respective habitat-type. This issue has however been resolved because the compromise text also includes a reference to 'the favourable reference area'. According to the definition in Article 3(5), this is the total area of a habitat type in a given biogeographical region or marine region at national level that is considered the minimum necessary to ensure the long-term viability of the habitat type. That is a positive addition, because it links the obligations to the areas that are needed to achieve the goal of a favourable conservation status of the habitat types that are protected. As a result, deterioration on 10 % of the

⁵⁰ See more in detail 6.4 and Society for Ecological Restoration (SER), Principles for Ecosystem Restoration to Guide the United Nations Decade 2021–2030, https://cdn.ymaws.com/www.ser.org/resource/resmgr/publications/principles_for_ecosystem_res.pdf, principle 3.

area for habitat types listed in Annex I where the habitat occurs, but which is not in good condition is only allowed if the area is not required to reach the favourable reference area for each habitat type.

Another question relates to the concern that the non-deterioration obligation would also apply to (very) small spots where snippets of habitats occur. This could have a major impact on the surrounding area. Whereas under the Habitats Directive, sites were selected on the basis of ecological value, by first identifying where habitat types and species occur in a significant, in other words a more than *negligible extent*, the non-deterioration obligation in Article 4(7) does not refer to such a threshold.⁵¹ According to the original proposal of the Commission, the non-deterioration obligation would therefore apply to all sites where a habitat type listed in Annex I of the Habitats Directive occurs, no matter how insignificant in size and quality. However, according to the compromise text, Article 4 (7) only applies to areas where the habitat types of Annex I occur which either are in good condition or are necessary to achieve the restoration targets (Article 4 (10)). Both areas will have to be identified in the national plans on the basis of Article 11 ff. It is only in these areas that the non-deterioration obligation needs to apply. For the most part this will ensure that small snippets fall outside the scope of the non-deterioration obligation, because they will not be necessary to reach the restoration targets. Small snippets of habitats will only rarely have to be protected if in the exceptional case they are needed to reach the favourable reference area. For these areas it also makes sense that, if they are needed for restoration measures, the ecological quality must not (significantly) deteriorate before and after the restoration measures are taken.

6.4 *Continuous Improvement and Significant Deterioration*

It is not fully clear what ‘continuous improvement’ in the first sentence of Article 4(6) means. The provision on continuous improvement has a sound scientific basis: you should see ecological restoration in a ‘restorative continuum’. There are different steps in restoration that will ultimately lead to recovery. This is continuous improvement.⁵² If Article 4 would not refer to ‘continuous improvement’, it would suffice for member states to take some restoration measures and stop there, without ever reaching a restored habitat. This could imply that any form of deterioration must be excluded. However,

51 A.S. Adams, C.W. Backes & A. Drahmman, *Een betere implementatie van de VHR in Nederland*, 2017, p. 16.

52 Society for Ecological Restoration (SER), *Principles for Ecosystem Restoration to Guide the United Nations Decade 2021–2030*, https://cdn.ymaws.com/www.ser.org/resource/resmgr/publications/principles_for_ecosystem_res.pdf, principle 3.

one could interpret this somewhat less strictly and consider temporary and minor local deterioration to be permissible as long as habitats and species on the sites where restoration measures are taken, continue to improve overall and the concept of 'continuous improvement' is complied with. This could and should be made explicitly clear in the preamble and in Commission guidelines.

Following the Commission's proposal, one of the questions which has been debated was whether every kind of deterioration is prohibited or only significant deterioration. The prohibition of every deterioration, no matter how insignificant, would result in a disproportionate and ineffective rigidity of the system and potentially lead to a multitude of administrative and judicial procedures without increasing effectiveness.

It should also be noted that under Article 6(3) of the Habitats Directive, projects may only be authorized if they do not have a 'significant' effect on the habitats to be protected. This has been elaborated in the Court's case law.⁵³ Similarly, the non-deterioration obligation under Article 6(2) of the Habitats Directive in our view also only relates to 'significant deterioration'. If the standards of review under Article 6(2) and (3) of the Habitats Directive were to diverge, the entire legal system would become inconsistent. Therefore, the Court confirmed that the Article 6(2) and (3) of the Habitats Directive seek to ensure the same level of protection and stated that a concurrent application is redundant.⁵⁴ This is also consistent with the objective of the directive. In this respect, the non-deterioration obligation should be consistent with Article 6(2) of the Habitats Directive which, because of its connection to Article 6(3) of the Habitats Directive, should also be read as a requirement to prevent significant damage. The compromise text has clarified this point. Already, the text versions from both the Council and the EP added the word 'significant' in Article 4(6) and Article 4(7) and the agreement has adopted this likewise. This is, in our view, a welcome clarification.

What is considered significant is related to the function an area has according to the national restoration plans in working towards a favourable conservation status and a favourable reference area. Every kind of harm and deterioration that jeopardizes the effectiveness of measures to be taken or

53 Case C-127/02 Kokkelvisserij [2004] *para.* 48. See *J. Verbeek*, Gebiedsbescherming in de Wet natuurbescherming, 2016, p. 72. et seq. See *Ch, Backes et al.*, Natuurbeschermingsrecht, 2017, p. 88. et seq.

54 Case C-241/08 Commission vs. France [2010], *para.* 30–32; Case C-258/11 Sweetman [2013], *para.* 32 and 33; Case C-521/12 Briels [2014], *para.* 19; Case C-387/15 Orleans [2016], *para.* 32 and Case C-399/14 Grüne Liga Sachsen [2016], *para.* 52.

already taken according to the restoration plan towards ultimately achieving a favourable reference area and a favorable conservation status is significant.

6.5 *Relation to Article 6(2) Habitats Directive*

Article 6(2) Habitats Directive requires the Member States to take ‘appropriate steps to avoid ... deterioration’ or significant disturbance of the habitats protected in Natura 2000-areas. Although Member States have a certain discretion to decide which measures are appropriate, the measures chosen have to ‘guarantee’ that deterioration does not occur.⁵⁵ Both the provisions in Article 6(2) Habitats Directive and Article 4(6 and 7) Nature Restoration Regulation apply complementary. To avoid any doubt in this regard, both paragraph 6 and paragraph 7 of Article 4 explicitly refer to the Habitats Directive (‘Without prejudice to Directive 92/43/EEC ...’). Therefore, within Natura 2000-areas, Article 6(2) Habitats Directive is stricter as it comprises an obligation of result. However, Article 4(6) of the compromise text requires measures aiming at a continuous improvement, which is not the case in Article 6(2) Habitats Directive. Furthermore, Article 4(7) of the compromise text may complement Article 6(2) Habitats Directive in case a negative effect on a Natura 2000-area does not lead to a significant deterioration of the existing quality of the habitat, but does significantly negatively influence the ability to achieve restoration targets in the area.

7 Legal Consequences

The Dutch concerns focused on the potential applicability of the non-deterioration obligation to areas outside the Natura 2000 network.⁵⁶ The non-deterioration obligation in Article 4(7) had, in its original wording, a wide scope and as a result could potentially have covered a large number of sites. Under Article 4(8), if this derogation is invoked, an assessment would have been required within these areas, on a case-by-case basis, to determine whether the conditions in Article 4(8) are fulfilled. As the original proposal comprised non-deterioration as an obligation of result, the fear was that all kind of activities with effects outside Natura 2000-areas would in the future need to be justified by applying a test similar to the appropriate assessment of

55 CJEU Case C-404/09 Commission vs. Spain [2011], para. 126; European Commission, Managing Natura 2000 sites. The provisions of Article 6 of the Habitats Directive 92/43/EEC, OJ 2019 C-33, p. 19 ff.

56 BNC (Review of New Commission Proposals), BNC-fiche 3 Assessment report regulation on nature restoration.

Article 6(3) Habitats Directive. As we have established, the compromise text has diminished the scope of the non-deterioration obligation. As well as that, the obligation has been significantly weakened and changed into a best-effort obligation. As a result, the non-deterioration clauses now focus more on the suitability and appropriateness of the measures taken and planned to avoid deterioration than on the potential negative effects of certain activities for areas outside the Natura 2000-network.

The concrete legal consequences will of course depend on where and to what extent habitat types occur outside Natura 2000 areas and whether these areas are already subject to protection obligations and a (planning-related) test in national legislation, as for example is the case in the Netherlands for the areas covered by the Nature Network Netherlands (abbreviated NNN). It is likely that the locations of habitat types outside Natura 2000 will largely overlap with NNN areas.⁵⁷ These NNN areas are already subject to a certain level of protection under current national law.⁵⁸

8 Conclusion

Considering that, after more than 30 years of existence, the Habitats Directive has not led to a favourable conservation status for the vast majority of habitat types in the EU, but on the contrary, for a considerable part, the loss of quality and deterioration of biodiversity are still continuing, it is very important that the EU Commission's initiative for a Nature Restoration Regulation has been pursued. Although the initial proposal has been watered down substantially and many of its 'teeth' have been pulled, for sure with regard to the non-deterioration clauses, it did not become a complete toothless tiger. As the current compromise text still leaves open substantial interpretation questions, some of which we have tried to address, it would be beneficial if the Commission would provide its view on these questions in a guidance document.

57 Arcadis, Quicksan Impact EU-Verordening natuurherstel (Quicksan Impact EU Nature Restoration Regulation), 2023, Appendix to letter to the Ministry of Agriculture, Nature and Food Quality of 22 May 2023, reference DGNV/ 27196273, p. 13.

58 Article 7.8 Environmental Quality Decree.