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The conservation objectives of the Natura 2000 area in the light of law and case law¹

Abstract

The article discusses the issue of conservation objectives of the Natura 2000 area. The basis for their analysis is the Habitats Directive and the Polish Act on Nature Conservation together with plans of conservation tasks. It is a key legal instrument for the proper management of the Natura 2000 area and the European network of Natura 2000 sites. Its importance is recognized in the legal interpretations made by the Court of Justice and non-binding documents of the European Commission. However, the question should be asked whether such an important, and indeed fundamental for Natura 2000, institution should not be clearer and more precisely regulated by the European legislator. Lack of unambiguous norms of the directive may cause discrepancies in defining the objectives of Natura 2000 protection both at the level of various EU Member States and at the national level – in relation to individual Natura 2000 areas in a given country.

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1. Separation of conservation objectives of Natura 2000 in comparison with other legal purposes related to protection of the environment.

A goal should be understood as a certain postulated state of affairs which is to be achieved by undertaking specific actions, establishing norms and introducing organizational solutions. In this sense, a goal is always something planned, intended by those who take action, establish norms or introduce organizational solutions². A goal is something that one strives for, aims at and wants to achieve³.

As J. Sommer, one of the pioneers of the modern science of Polish environmental law, aptly remarked, the issue of the purposes which such law pursues is confusing. The problem arises of whether these are goals set by the legislator, or goals that link legal standards with the bodies that apply them, or goals that legal addressees expect to achieve based on legal standards⁴. Such differentiation, visible through the prism of the wording in which the legislator sets out certain goals, can be found in legal regulations.

Inspired by the aforementioned view on these objectives in law (legal purposes), and entering the plane of legal regulation of environmental protection, one can distinguish: 1) the objectives of the European Union in the field of environmental protection (objectives of European environmental policy), expressed in fundamental EU legislation (the Treaties), 2) the objectives of acts in the field of environmental protection, 3) the aims of actual activity, regulated by law, and treated by the legislator as essential – for the sphere of regulation, 4) objectives of legal institutions, created by rules (laws) governing the protection of the environment, 5) targets generally indicated by the rules, but defined for the specific needs of each case (area or object protected by regulations from legal protection of the environment), 6) regulatory measures for the implementation of the stated objectives.

Ad. 1. The best illustration of the first category of objectives is the wording of Article 191 paragraph 1 of the Treaty on European Union. This provision states that the Union's Environmental Policy contributes to the following objectives: preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational use of natural resources, promoting measures at international level to deal with regional or global environmental issues, in particular combating climate change.

² T. Chauvin, T. Stawiecki, P. Winczorek, *Wstęp do prawoznawstwa*, Warszawa 2019, p. 123.

³ S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, vol. I, Warszawa 2003.

⁴ J. Sommer, *Efektywność prawa ochrony środowiska i jej uwarunkowania – problemy udatności jego struktury*, Wrocław 2006, p. 6.

Ad. 2. An example of the purpose of environmental legislation can be taken from the preamble to Council Directive 92/43 /EEC of 21 May 1992 on the protection of natural habitats and wild fauna and flora⁵ (hereinafter Directive 92/43). The main objectives of this act are to promote the preservation of biodiversity (preservation of such diversity may in some cases require the maintenance or even stimulation of human activity), taking into account economic, social, cultural and regional requirements. The aim of the Directive is to be in line with the achievement of the general objective of sustainable development. The adoption of measures to promote the conservation of priority habitats and species of priority importance to the Community is the joint responsibility of all Member States. The directive refers to numerous objectives, especially considering the level of their implementation. The most general and framework goal is to preserve, protect and improve the quality of the environment, including the protection of natural habitats and wild fauna and flora; this objective is in keeping with the general Community interest as expressed in Art. 130 (now Art. 174) of the Treaty establishing the European Community (the provision defines the Community policy and its objectives in the field of the environment).

Ad. 3. An appropriate exemplification is Art. 2(2) of the Act on nature protection, where the legislator lists the goals of nature protection (among others, maintaining ecological processes and stability of ecosystems, preserving biodiversity).

Ad. 4. A legal institution created by EU environmental protection regulations is the Natura 2000 area (and the Natura 2000 network of areas). The designation of special areas of protection that form a coherent European ecological network is a key legal instrument for implementing Directive 92/43. This is to enable the restoration or conservation of natural habitats and species of Community interest in an appropriate conservation status. In Art. 3(1) of the directive we read that a coherent European ecological network of special protection areas will be created, under the name Natura 2000. The goal of the Natura 2000 network is to preserve certain natural habitats and species habitats in the proper conservation status within their natural range or, if appropriate, to restore them.

Ad. 5. The general purpose indicated by the provisions, but requiring clarification for a particular area (object) is indicated on the basis of the interpretation of recital 10 in the preamble to Directive 92/43 and Art. 6(3) of this Directive. The preamble states that an appropriate assessment should be made of any plan or program likely to have a significant effect on the conservation objectives of an area, which has been designated or will be designated in the future. In turn, according to Art. 6(3) of the Directive, any plan or project that is not directly

⁵ Official Journal of the European Communities L 206/7.

related to or necessary for the development of the area, but which may significantly affect it, either separately or in combination with other plans or projects, is subject to an appropriate assessment of its effects for the area from the point of view of assumptions its protection.

Ad. 6. I mean such instruments that contribute to the proper implementation of the provisions of the European directive or national act. They can be, for example, reporting or scientific instruments. The preamble to Directive 92/43 states that "in order to ensure that the implementation of the provisions of the directive is monitored, the Commission will periodically prepare summary reports, inter alia, on the basis of information sent to it by the Member States regarding the application of national provisions adopted pursuant to the directive. In order to implement the directive, it is important to deepen scientific and technical knowledge, and it is therefore appropriate to support the necessary research and scientific work." In turn, the Polish Act on nature protection mentions in Art. 3 certain instruments (measures, activities) by means of which nature protection goals are implemented (e.g. including nature protection requirements in various plans, encompassing nature resources and creations with forms of protection, conducting educational activities).

It is worth asking the question of what distinguishes the objectives of conservation in Natura 2000 areas from the perspective of other legal objectives related to environmental protection. At the beginning, it should be stipulated that the objectives of the European ecological network Natura 2000 are a slightly different category, i.e., enabling the preservation of the indicated natural habitats of species in an appropriate state of conservation within their natural range, or, where appropriate, restoring them (Article 3 (1) of the Directive 92/43), comparing them for the purpose of protecting a given Natura 2000 site. The former are of a general and framework character. The latter should be specific in order to form the basis for the assessment of certain projects by law enforcement authorities. For example, in the ordinance of the Regional Director for Environmental Protection in Wrocław of 11 July 2014 regarding the establishment of a plan for conservation tasks for the Natura 2000 area Rudawy Janowickie⁶, the objectives of protection indicated for a given subject of protection include preservation of the subject of protection in the appropriate conservation status, preservation of particular species' wintering grounds, enhancement of the state of knowledge, identification of threats, assessment of the conservation status and proposal of conservation measures, preservation of habitat patches. There is a preliminary reflection that the conservation objectives of a given Natura 2000 site are not

⁶ Zarządzenie Regionalnego Dyrektora Ochrony Środowiska we Wrocławiu z dnia 11 lipca 2014 r. w sprawie ustanowienia planu zadań ochronnych dla obszaru Natura 2000 Rudawy Janowickie PLH020011.

always indicated precisely and clearly, which may give rise to doubts among the authorities involved in the process of applying the law.

Therefore, in further sections I want to deal with the legal nature of the conservation objectives of the Natura 2000 area.

2. The concept of conservation objectives and their place in the structure of Directive 92/43

The concept of conservation objectives is derived from legal language. It appears in several places in the text of Directive 92/43. In particular, recital 8 in the preamble to the Directive states that “it is appropriate to take the necessary measures in each designated area taking into account the conservation objectives pursued,” while in recital 10 it provides that there should be “an appropriate assessment of any plan or program likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future.”

Directive 92/43 does not define conservation objectives, nor does it directly require the establishment of “conservation objectives.” Their appointment does not appear as one of the stages in the procedure towards the establishment of special areas of conservation. In Art. 4(1) of the Habitats Directive, when information on each area to be provided to the European Commission is mentioned, the site map, its name, location, size and data resulting from the application of the criteria listed in Annex III (stage I) are listed. The provision provides none of the conservation objectives of a given Natura 2000 site. There is therefore no formal obligation to identify these objectives, as opposed to “necessary conservation measures” as stipulated in Art. 6(1) of the Directive. In this provision, we read that for special areas of protection, Member States shall put in place the necessary conservation measures including, where appropriate, appropriate development plans developed specifically for these areas or integrated with other development plans, and appropriate statutory, administrative or contractual measures that meet ecological requirements natural habitat types or species. The European legislator, therefore, lists examples of protective measures necessary for the effective protection of a Natura 2000 site, orders them to be adopted by states, but does not indicate the obligation to set conservation objectives for a specific Natura 2000 site.

Seeing that the legal language does not contain a definition of conservation objectives, it is worth trying to define the understanding of the wording in the language we use to talk about the law. The concept and understanding of conservation objectives can be derived from the wording of certain provisions of Directive 92/43; in particular, I have in mind Art. 1 in connection with Art. 2 and 6(1).

The framework for achieving conservation objectives is set out in particular in Art. 1, especially when it defines the proper conservation status of a natural habitat and the appropriate conservation status of species. The objectives of protection should be situated between the general objectives of the Directive, as proclaimed by Art. 2(1) of this act, and the protection measures referred to in Art. 6(1). They appear as a way of achieving the general objectives of the Directive at a specific Natura 2000 site, and are reflected in specific protection measures (e.g. statutory, administrative or contractual) – which are employed precisely to achieve the protection objectives.

The conclusion is that Directive 92/43 does not specify the form and content of conservation objectives, nor does it indicate the role they should play in managing conservation areas. This is exceptional, especially in view of the fact that the definition of conservation objectives is key and creates a backbone for Natura 2000 structural coherence, due to their legal effects⁷.

In summary, conservation objectives can be defined as results that should be achieved in each Natura 2000 site, a reference point for any human activity that may affect a Natura 2000 site, and a reference point for the development of conservation measures appropriate for a Natura 2000 area. It seems that the definition of conservation objectives is determined by two elements: 1) SDF (standard forms of data), providing information that can be defined as goals of protection (conservation objectives), 2) a favourable conservation status – which seems to be closely related to the objectives of protection. A favourable conservation status is a goal to be achieved via the implementation of conservation objectives.

The specific legal effects of conservation objectives are strictly dependent on their formulation, especially in terms of their precision and clarity. The more obscure and general conservation objectives are, the more difficult it is to precisely specify (predict) the effect of a plan or project or identify an appropriate compensation measure.

3. Legal significance of the conservation objectives of Natura 2000

The importance of correctly establishing the conservation objectives of a particular Natura 2000 site is revealed on several levels.

First, conservation objectives form the core of Art. 6(3) of Directive 92/43, which states that the assessment of any plan or project likely to have a significant

⁷ L. Stahl, *The concept of „conservation objectives” in the Habitats Directive. A need for a better definition?* [in:] *The Habitats Directive in its EU Environmental Law Context. European Nature's Best Hope*, New York 2016, p. 64.

impact on a Natura 2000 site is carried out from the point of view of the conservation objectives of that area. In this sense, precision in determining the conservation objectives of a specific Natura 2000 site is necessary for proper assessment of the impact of a plan or project on a given Natura 2000 site. In the jurisprudence of the EU Court of Justice, it has been stated that this provision sets a strict authorization criterion. If the plan or project carries the risk of violating the assumptions for the protection of an area, then they should be consistently considered as likely to strongly affect the area. When assessing the possible effects of plans or projects, their material nature should be determined in particular in the light of the characteristics and specific environmental conditions of the area to which the plan or project relates. Assumptions of protection can be established, as follows from Art. 3 and 4, and in particular Art. 4(4) of Directive 92/43, based on the importance of these sites for the conservation or restoration, in an appropriate state of conservation, of a type of natural habitat listed in Annex I or a species listed in Annex II, as well as for the purposes of Natura 2000 coherence and on the basis of the risk of degradation or destruction for which these areas are exposed⁸. In addition, a plan or project can only be implemented if there is no reasonable scientific doubt about the negative impact on the conservation objectives of the Natura 2000 site.

In this respect, conservation objectives seem to be a normative reference (basis) for assessing the significant impact of the project on the Natura 2000 site.

Secondly, the conservation objectives relate to compensatory measures referred to in Art. 6(4). These measures shall be taken in the light of the objectives of conservation, because they have to protect the overall coherence of Natura 2000, which contributes to the realization of conservation objectives. According to the position of the European Commission, compensatory measures should ensure adequate replacement of a given place and should refer to the purpose of protecting the given area⁹.

The relationship between these two legal effects of conservation objectives is emphasized in the judgment of the Court of Justice in Case C-304/05: “knowledge of these effects [plan or project – AH] for the purpose of protecting the area in question is a necessary condition for the application of Article 6 paragraph 4 of the Directive 92/43, because otherwise it will not be possible to assess any of the conditions for the application of this derogating provision. The assessment of any essential reasons of overriding public interest and the existence of less harmful alternative solutions requires their consideration in relation to the

⁸ Judgment of the Court of 7 September 2004 in Case C-127/02.

⁹ See Managing Natura 2000 sites. The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC, European Commission guidance, http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf [access: 2.12.2019].

adverse effects caused by the plan or project in a given area. In addition, in order to determine the nature of any compensatory measures, the adverse effects on the site should be clearly identified”¹⁰.

This necessary relationship, indicated by Directive 92/43, the Commission and the Court, is also reflected in Polish law. Article 34 of the Nature Conservation Act of 16 April 2004 provides for environmental compensation necessary to ensure the coherence and proper functioning of the Natura 2000 network.

Thirdly, the assessment of whether there has been a deterioration of natural habitats and habitats of species, as well as disturbance of species for which a Natura 2000 site has been designated (Article 6(2) of Directive 92/43), should be made from the perspective of the conservation objectives; in other words – from the point of view of the natural conditions that required the designation of Natura 2000.

Finally, conservation objectives legally determine the management of Natura 2000 sites because they should be implemented through appropriate protective measures (statutory, administrative, contractual), taken in accordance with Art. 6(1) of Directive 92/43.

Therefore, regardless of the legal location of the conservation objectives of Natura 2000 in national law, it should be stated that they have an indisputable normative force in accordance with Art. 6(3), which is also emphasized in the jurisprudence of the EU Court of Justice.

4. Conservation objectives in other acts of EU law

To further approximate the design of conservation objectives, it is worth comparing them with similar concepts found in EU law. We encounter them in the Water Framework Directive¹¹ (Art. 4 is dedicated to environmental objectives) or the Marine Strategy Framework Directive¹² (Art. 3(7) defines an environmental objective: a qualitative or quantitative statement on the desired condition of the different components of sea water and the pressures and impacts on them, for each marine region or subregion. Environmental objectives are determined in accordance with Art. 10 (titled Definition of environmental objectives)).

¹⁰ Judgment of the Court of 20 September 2007, in Case C-304/05, Commission of the European Communities v Italian Republic.

¹¹ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ EC L 327/1.

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

The environmental objectives (conservation objectives) of all three directives seem to be of a similar nature.

Although English texts distinguish environmental goals as *environmental objectives* (Water Directive) *environmental targets* (Marine Strategy Directive), in some of their national translations (French, German, Spanish) the terms are the same, both in the Water and Marine directives. Such semantic convergence reinforces the idea that the conservation objectives in both directives are of the same nature, or at least that the European legislator does not make a significant distinction between non-identical concepts.

This may allow further comparison with the conservation objectives of the Habitats Directive. In fact, all of these goals are aimed at achieving a good environmental status for certain elements of the environment: waters, marine environment, habitats and species.

In addition, these conservation objectives are not only guidelines, but are legally binding and set real environmental quality standards. These are the results that should be achieved.

Despite these common features, the Water Directive and the Marine Directive differ from Directive 92/43 because the first two clearly define it in terms of content, procedure, and effects of the environmental objectives they set, while the latter remains unclear and rather evasive.

This difference could be attributed to the fact that the Water and Marine Directives are newer and reflect some conceptual progress. In addition, it reveals the need for greater clarity in the Habitats Directive, which would be useful to guarantee the overall coherence of Natura 2000, especially given the content of conservation objectives, which have not been defined as of yet.

5. The conservation objectives of Natura 2000 area in the light of selected Polish legal regulations

The question arises of how national legislation treats the issue of conservation objectives, how they are implemented, which in Directive 92/43 has been defined rather vaguely, without clear indications for national legislators. National authorities, given the lack of a precise definition of conservation objectives, have some discretion in what they are to achieve. I would like to remind you that the European Commission recommends that they should be formulated as precisely and clearly as possible, that they should be included in something that can be identified, checked or counted. As a side note, it is worth noting that the Commission is trying to compensate for the shortcomings of Directive 92/43 by developing guides to help set conservation objectives, but such technical support is not able to fill the legal vacuum.

In Poland, the definition of conservation objectives is required from planning instruments for managing Natura 2000. Regulation, however, is different to the plan of protection tasks of Natura 2000 and the Natura 2000 protection plan. The Act of 16 April 2004 on nature protection¹³ explicitly provides for the purposes of the tasks, which must articulate a plan of protection tasks, but it is less clear when it comes to a protection plan for Natura 2000. According to the wording of Art. 28(10)(3) of the Act, indication of the objectives of conservation measures is one of the elements that make up the plan of conservation tasks for a Natura 2000 site (together with, for example, a description of the site boundaries and a map of the site, identification of potential and existing threats to maintaining the proper condition of habitats, defining the objectives of protective measures, indicating the entities responsible for their implementation). Meanwhile – when we look at the obligatory components of the Natura 2000 site protection plan – we will not directly find the conservation objectives among them. Admittedly, a certain substitute for such purposes may be “determining the conditions for maintaining or restoring the proper conservation status of the objects of protection of Natura 2000 sites, maintaining the integrity of Natura 2000 sites and the coherence of Natura 2000 sites” (Article 29(8)(3) of the Nature Protection Act); however, if the legislature wanted to refer directly and clearly to the objectives of conservation measures (for the Natura 2000 site protection plan), then it should write so clearly in the legal text. Since it did not, we can assume that it did not perceive such a need.

The question may be asked whether the institution of conservation objectives, outlined in Directive 92/43 and developed in its legal interpretations, is something specific for Natura 2000 areas, or whether it applies to other forms of nature protection functioning in Polish law. The rational answer should be based on the assumption that it would be impossible to talk about effective, legal protection of a particular natural area without specifying the normative goals that this protection is to achieve. This is what the present text is for, providing arguments to support the hypothesis presented above.

Comparison of such a hypothesis with the wording of the relevant provisions of the Nature Conservation Act confirms the accuracy of the adopted assumption. When taking into account the regulation of the key forms of nature conservation in Polish law, we see that the protection plan for a national park, plan to protect a nature reserve, and the plan to protect a landscape park must contain an indication of the objectives of nature conservation and the natural and social conditions (additionally, economic conditions in a nature park) for their implementation (Article 20(3)(1), Article 20(4)(1) of the Nature Protection Act). Therefore, it is clear that the legislature not only notices the need

¹³ OJL 2018, item 1614.

to indicate what nature protection in a given area is to serve (which protection objectives should be achieved), but also requires taking into account the accompanying circumstances (conditions) of social, environmental and economic nature. From this point of view, it may be astonishing that among the obligatory components of the Natura 2000 protection plan, there is no direct reference to the purposes of protection.

However, since they are an obligatory element of the plan of protection tasks under Natura 2000, it is worth investigating which of them are reflected in specific plans of protection tasks. In other words, how do specific plans for conservation tasks define the objectives of conservation activities? I place the objectives of protective actions against the background of indicated conservation activities; the relationship between them should be understood thus, that protective measures are to lead to the achievement of conservation objectives.

In the plan of conservation tasks of the Pilczycki Forest PLH 020069 Natura 2000 area¹⁴, the objectives of the conservation activities are placed in Annex 4, along with the protection objects covered by the plan. They are defined primarily as: supplementing the state of knowledge about the habitat, restoring the proper structure and function of the habitat, improving the state of the habitat, supplementing the state of knowledge about the population of species, improving the possibilities of species migration. Protective measures (Annex 5) include, for example, removal of illegal dumps and garbage, leaving trunks of dead trees, limiting the performance of forest works, including cutting down dying trees, designating an educational and tourist path, preserving natural habitats that are objects of protection, and annual mowing.

In the plan of conservation tasks of the Natura 2000 Torfowisko Wielkie Błoto PLH 120080 area¹⁵, protective actions for the object of protection are the restoration of species' habitats to proper condition via active protection and improvement in the parameters of protection. Examples of protective measures are the removal of deposits of trees and shrubs up to 20 years of age, inhibition of excessive water outflow, elimination of invasive and expansive species, continuation or restoration of extensive use of meadows, assessment of the effectiveness of activities related to the elimination of invasive species, water and legal survey.

The plan of conservation tasks for Natura 2000 Ostoja Nadgoplańska PLB 040004 of 1 February 2016, introduced by joint ordinance of the Regional

¹⁴ Zarządzenie nr 18 Regionalnego Dyrektora Ochrony Środowiska we Wrocławiu z dnia 11 października 2013r. w sprawie ustanowienia planu zadań ochronnych dla obszaru Natura 2000 Las Pilczycki PLH020069.

¹⁵ Zarządzenie Regionalnego Dyrektora Ochrony Środowiska w Krakowie z dnia 31 lipca 2014 r. w sprawie ustanowienia planu zadań ochronnych dla obszaru Natura 2000 Torfowisko Wielkie Błoto PLH120080, http://krakow.rdos.gov.pl/files/artykuly/21154/bloto_zarzadzenie.pdf [access: 2.12.2019].

Director for Environmental Protection in Bydgoszcz and the Regional Director for Environmental Protection in Poznań¹⁶ formulates examples of the following objectives of conservation measures: maintenance of at least 115 breeding pairs in the area, maintenance of at least 20 buzzing males in the area, supplementing the state of knowledge and undertaking protection measures determined on the basis of supplementing the state of knowledge, restoration and maintenance of habitats allowing to maintain at least 45 breeding pairs in the area. The protective measures indicated include annual mowing of herbaceous vegetation, monitoring of the conservation status together with assessment of the species abundance in the area, and determination of the areas in which it is necessary to preserve habitats.

In turn, in the plan of conservation tasks for the Natura 2000 area Lake Kubek PLH 300006¹⁷, we find such conservation objectives as improving the conservation status by expanding the size of the habitat in the Natura 2000 area, improving the conservation status by recreating the conditions for the occurrence of submerged vegetation and floating leaves, and reducing pollution in Lake Kubek waters, improving the conservation status of the habitat by increasing the amount of dead wood, and monitoring species' conservation status. Protective measures include increasing the amount of dead wood, preparing an expert opinion on ichthyofauna, remodeling ichthyofauna in accordance with the expert's recommendations, cutting down blooms and growths, creating places for habitat development, and monitoring.

However, in the plan of conservation tasks for the Natura 2000 Mrowle Łąki PLH 180043 area¹⁸, the objectives of conservation measures include advice to stop the decline of the habitat area – maintain the current area (8.23 ha) or increase it, restore it, and in patches with good conservation status and floristic composition appropriate for the habitats, ensure the preservation of sites and species habitats in the area. The implementation of goals is to be supported by such protective measures as marking area boundaries with information signage, preservation of the habitat by conducting extensive mowing or grazing, use in accordance with the requirements of the appropriate agro-environmental pack-

¹⁶ Zarządzenie Regionalnego Dyrektora Ochrony Środowiska w Bydgoszczy i Regionalnego Dyrektora Ochrony Środowiska w Poznaniu z dnia 1 lutego 2016 r. w sprawie ustanowienia planu zadań ochronnych dla obszaru Natura 2000 Ostoja Nadgoplańska PLB040004.

¹⁷ Zarządzenie nr 9/13 Regionalnego Dyrektora Ochrony Środowiska w Poznaniu z dnia 4 grudnia 2013 r. w sprawie ustanowienia planu zadań ochronnych dla obszaru Natura 2000 Jezioro Kubek PLH300006.

¹⁸ Zarządzenie Regionalnego Dyrektora Ochrony Środowiska w Rzeszowie z dnia 14 listopada 2016 r. w sprawie ustanowienia planu zadań ochronnych dla obszaru Natura 2000 Mrowle Łąki PLH180043.

age, improvement of the habitat condition through shrub removal and felling, and monitoring of the condition of species present.

6. The conservation objectives of Natura 2000 in recent jurisprudence of the EU Court of Justice

The practical importance of the goals of protecting Natura 2000 areas is confirmed by the latest case law of the EU Court of Justice. The Court has raised the issue of conservation objectives in two recent judgments, issued on 12 June 2019, in the context of environmental impact assessments. In its judgment in Case C-43/18, the Court stated that Art. 3(2) and (4) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (Directive 2001/42) must be interpreted as meaning that the object addressed by the referring court, i.e., an order in which a Member State designates a special area of protection and sets out conservation objectives and certain preventive measures, is not included in “plans and programs” for which an environmental impact assessment is mandatory. The decision was made based on the following facts.

The CFE industrial group owns land in Belgium. As part of the creation of the Natura 2000 network, in 2003 the land was included in the list of sites proposed as special areas of protection. A number of complaints to Belgian and European institutions in which the CFE protested against the inclusion of land in Natura 2000 had no effect. Finally, on 14 April 2016, the government of the Brussels-Capital Region issued an ordinance regarding the designation of the area BE 1000001 as a Natura 2000 site covering the land in dispute. On 12 July 2016, the CFE appealed to the Belgian Council of State (administrative court) for annulment of the order. It alleged in particular a violation of Art. 3 of Directive 2001/42, because the government should have carried out an environmental impact assessment, because the ordinance of 14 April 2016 could have had a significant impact on the environment, or because the government should have at least determined whether this act could have had such an impact, which was not done. In reply, the government of the capital region states in principle that the said act is a measure directly related to or necessary for the development of the area within the meaning of Art. 6(3) of Directive 92/43, exempted from the environmental impact assessment pursuant to Art. 3(2)(b) Directive 2001/42. The Council of State asked the Court whether an ordinance in which a state authority designates a special area of protection in accordance with the Habitats Directive, containing conservation objectives and general preventive measures of a normative nature, constitutes a plan or

framework within the meaning of Directive 2001/42. In its justification, the Court stated, *inter alia*, that, having regard to the purpose of Directive 2001/42, which is to ensure a high level of environmental protection, the provisions determining the scope of its application, and in particular the provisions containing the definitions of the acts it covers, should be interpreted broadly. The arguments that the provisions of Art. 3(2)(b) Directive 2001/42 and Art. 6(3) sentence 1 of Directive 92/43 exclude in any case the obligation to assess the environmental impact in a case such as that at issue in the main proceedings should be rejected. In this regard, on the one hand, the Brussels-Capital region claimed that, since the regulation of 14 April 2016 sets out conservation objectives, it has only beneficial effects and, consequently, does not require an assessment of its environmental impact. However, it should be recalled that the fact that the projects are to have a beneficial effect on the environment is not relevant in the context of examination of the need to subject those projects to an assessment of their environmental impact. The Court also held that the existence of a plan or project that is not directly related to the development or necessary for the development of a given protected area depends mainly on the nature of the intervention. Meanwhile, the act in which a Member State designates a site as a special conservation area in accordance with Directive 92/43 is by its very nature directly related to land use or necessary for it. Article 4(4) of Directive 92/43 requires such a designation in order to implement it. Therefore, an act such as the order of 14 April 2016 may be exempted from the “appropriate assessment” within the meaning of Art. 6(3) of Directive 92/43, and in consequence of the “environmental impact assessment” in the meaning of Art. 3(2)(b) of Directive 2001/42. In addition, Art. 6(3) of Directive 92/43 provides that an appropriate assessment within the meaning of that provision shall be made in the light of “the assumptions for its protection.” Meanwhile, the act defining the assumptions cannot be logically assessed in the light of the same assumptions. However, the fact that an act such as that at issue in the main proceedings need not necessarily be preceded by an environmental impact assessment pursuant to Art. 6(3) of the Habitats Directive in connection with Art. 3(2)(b) of Directive 2001/42, does not mean that it is excluded from all obligations in this respect, as it cannot be ruled out that it may lay down rules that will bring it into line with a plan or program within the meaning of that Directive, where an environmental impact assessment may be mandatory. As regards, first of all, the alignment of an ordinance with a plan or program within the meaning of Directive 2001/42 – it should be recalled that under Art. 2(a) of Directive 2001/42, plans or programs are those that meet two cumulative conditions, namely, on the one hand, they have been prepared or adopted by an authority at national, regional or local level or prepared by the authority for adoption through a legislative procedure by parliament or

government, and, on the other hand, are required by law, regulation or administrative provision. The Court has interpreted this provision in such a way that plans and programs whose adoption is governed by national statutory provisions should be considered as “required” for the purposes and application of Directive 2001/42 and, as a consequence, to be subject to assessment of their environmental impact under the conditions laid down in that Directive or executive order, which specify the competent authorities for their adoption and the procedure for their preparation. Secondly, as regards the question of whether a plan or program should be preceded by an environmental impact assessment, it should be recalled that plans and programs meeting the requirements of Art. 2(a) of Directive 2001/42 may be subject to an environmental impact assessment, provided that they are one of those plans or programs referred to in Art. 3 of Directive 2001/42. Article 3(1) of Directive 2001/42 provides that the environmental impact assessment is carried out in relation to the plans and programs referred to in paragraphs 2, 3 and 4 and which may have a significant impact on the environment. In accordance with Art. 3(2)(a) of Directive 2001/42, an environmental impact assessment is carried out for all plans and programs that are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, spatial development plans or land use and which set the framework for future development consent for projects listed in Annexes I and II to Directive 2011/92. In turn, in case number C-321/18, the Court ruled that Art. 3(2) and (4) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programs on the environment must be interpreted as meaning that the order in which the body of a Member State shall be determined on a regional basis for network Natura 2000 conservation objectives are indicative, whereas conservation objectives at site level are normative, it is not included in “plans and programs” within the meaning of this Directive for which an environmental impact assessment is mandatory. The facts have evolved such that, in line with the Belgian Nature Conservation Act of 1973, the government sets conservation goals at regional level in Wallonia for each type of natural habitat and species; they are indicative. Based on these indicative goals, the government sets conservation objectives that apply at Natura 2000 level; these purposes are normative. The Walloon environmental code transposing the directive does not provide that the indicative protection objectives should be subject to an environmental impact assessment under “plans and programs.” On 1 December 2016, the Walloon government adopted an ordinance establishing qualitative and quantitative conservation objectives applicable to the Walloon region in relation to Natura 2000. The social organization *Terre wallone* ASBL challenged the ordinance, claiming that it constituted a “plan or

program” within the meaning of the Directive, and should therefore be subject to an environmental impact assessment. In the justification of the judgment, the Tribunal indicated in particular that, in accordance with Art. 1 of the Directive, its aim is to ensure a high level of environmental protection and to contribute to the integration of environmental aspects into the preparation and adoption of plans and programs to promote sustainable development. Given the purpose of the Directive, the provisions determining the scope of its application, and in particular the provisions containing the definitions of the acts it covers, should be interpreted broadly. The Belgian Government and Ireland argue that since the decree of 1 December 2016 determines the purposes of protection, it has only beneficial effects and the consequences do not require an assessment of its impact on the environment. However, it should be recalled that the Court has already held that the fact that projects are to have a beneficial effect on the environment is irrelevant when examining the need to assess those projects for their environmental impact. As regards, first of all, the alignment of the order at issue in the main proceedings with the plan or program within the meaning of the Directive – it should be recalled that under Article 2(a) of the Directive, plans or programs are those which meet two cumulative conditions: namely, on the one hand, they have been prepared or adopted by an authority at national, regional or local level or prepared by an authority for adoption by means of a legislative procedure by parliament or government and, on the other hand, are required by laws, regulations or administrative provisions. The Court interpreted this provision in such a way that the “required” in the meaning and for the purposes of the Directive, and in consequence, to be subject to an assessment of their impact on the environment, should be considered plans and programs, the adoption of which is governed by national laws or regulations that define the competent authorities for their adoption and the procedure for their preparation. In the present case, the order of 1 December 2016 was prepared and adopted by a regional body, i.e. the Walloon government, and is required by Art. 25 bis of the Act of 1973. Secondly, as regards the question of whether the plan or program should be preceded by an environmental impact assessment, it should be recalled that plans and programs meeting the requirements of Art. 2(a) of the Directive may be subject to an environmental impact assessment, provided that they constitute one of those plans or programs referred to in Art. 3. Article 3(3)(1) of the directive provides that the environmental impact assessment is carried out in relation to the plans and programs referred to in par. 2, 3 and 4 and which may have a significant impact on the environment. In accordance with Art. 3(2)(a) of the Directive, an environmental impact assessment shall be carried out for all plans and programs that are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water

management, telecommunications, tourism, land use or land use plans and which set the framework for future development consent for projects listed in Annexes I and II to Directive 2011/92 on the assessment of the effects of public and private projects on the environment. The concept of “plans and programs” applies to any act which, by setting out control rules and procedures, establishes a significant number of criteria and detailed rules relating to the authorization and implementation of one or more projects that may have a significant impact on the environment. In the present case, the ordinance of 1 December 2016 does not list conservation objectives for specific areas, but summarizes them for the entire Walloon region. In addition, it results from Art. 25 bis 1, third paragraph, of the 1973 Act that protection objectives at the Walloon region level are only indicative, whereas Art. 25 bis in the second subparagraph of Article 2 provides that the conservation objectives applicable at the level of Natura 2000 sites are normative. In the light of these circumstances, it must be concluded that an act such as that at issue in the main proceedings does not set out a framework for future authorization to implement projects, and therefore it is not covered by Art. 3(2)(a) or Art. 3(4) of Directive 2001/42.

7. Summary and conclusions

Directive 92/43 is definitely laconic towards the conservation objectives of Natura 2000 sites. Meanwhile, it is a key legal instrument for the proper management of a Natura 2000 site and the European network of Natura 2000 sites. Its significance is recognized in the interpretations of law made by the Court of Justice and non-binding documents of the European Commission. The Court’s statements are sometimes ambiguous, which is not surprising, given that the Directive provides little of the content of the objectives of protection, and also leaves it up to the national authorities to determine the forms and methods. This results in a very heterogeneous situation across individual Member States.

Interpreting the provisions of the Habitats Directive can help uncover the features and shape of this institution. However, the question should be asked whether the European legislature should not more clearly and precisely regulate such an important and even fundamental institution for Natura 2000. The lack of explicit standards in the Directive may cause divergence in the definition of the objectives of protecting a Natura 2000 site both at the level of all EU Member States and at the national level – in relation to specific Natura 2000 sites in a given country.

The Polish Act on nature protection uses the concept of the objectives of protecting a Natura 2000 area. It is surprising, however, that it does so literally

only in connection with the plan of conservation tasks for a Natura 2000 area. It does not formulate any instructions as to how to determine them. This leads to a state of affairs in which specific plans for protective tasks, in terms of defining protection objectives, are overly imprecise and too general. From this perspective, assessing and controlling whether the protection objectives of a given Natura 2000 area are being implemented may be difficult, or even impossible. This also applies to judicial control over the activities of public administration involved in setting and achieving protection goals.

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SUMMARY

The text consists of seven parts.

In the first part, against the background of understanding the purpose of law, I present the concept of the objectives of protecting the Natura 2000 area, confronting those objectives with other objectives expressed in the environmental protection regulations. It can be distinguished: 1) the objectives of the European Union in the field of environmental protection (objectives of the European environmental policy), expressed in fundamental for the EU legislation (Treaties), 2) the objectives of acts involved to the field of environmental protection, 3) the aims of actual activity, regulated by law, and treated by the legislator as an essential – for the sphere of regulation, 4) objectives of legal institutions, created by rules (laws) governing the protection of the environment, 5) targets generally indicated by the rules, but defined to the specific needs of each case (area or object protected by regulations from legal protection of the environment), 6) regulatory measures for the implementation of the stated objectives. In the second part, I analyze the concept of the objectives of protecting the Natura 2000 site, based on Directive 92/43. The concept of conservation objectives is derived from legal language. A few times it appears in the text of the Directive 92/43. Conservation objectives can be defined as results that should be achieved in each Natura 2000 site, a reference point for any human activity that may affect the Natura 2000 site, a reference point for the development of conservation measures appropriate for the Natura 2000 area. Directive 92/43 does not specify the form and content of conservation objectives, nor does it indicate the role they should play in managing conservation areas. The third part is devoted to explaining why the proper diagnosis of the protection objectives of a Natura 2000 site is of great legal importance. First of all, precision in determining the conservation objectives of a specific Natura 2000 site is necessary from the point of view of proper assessment of the impact of a plan or project on a given Natura 2000 site. In the fourth part, I am looking for examples of other EU legislation in which the concept of conservation objectives appears. I am analyzing similarities with the protection objectives of Natura 2000. In particular, I recall the conservation objectives referred to in the Water Directive.

In the fifth part I describe examples of Polish legal regulations in which the legislator provides for protection purposes. National legislation treats the issue of conservation objectives, how it is implemented, which in Directive 92/43 has been defined in a rather vague manner, without clear indications for national legislators. National authorities, given the lack of a precise definition of conservation objectives, have some discretion in what they are to achieve. I would like to remind you that the European Commission recommends that they should be formulated as precisely and clearly as possible, that they should even be

included in something that can be identified, checked or counted. The sixth part is completed by the analysis of judgments of the Court of Justice, which reveal the practical importance of protection objectives, especially in the context of environmental impact assessment. In the last part I formulate a summary and conclusions.

Keywords: legal nature protection, environmental law, Natura 2000 areas, conservation objectives, environmental protection, Natura 2000