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## **Restoring the Habitats Directive?**

A legal analysis on how the proposal on the Nature Restoration Regulation would address the current forest biodiversity protection in the EU

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## **Abstract**

Forests and their biodiversity are degrading both globally and in the EU. Although the EU is committed to reverse biodiversity loss, the EU legal system is facing the challenge of meeting both international and EU commitments. The current legislation protecting forest biodiversity is concentrated in the Habitats and Birds Directives. The Nature Restoration Regulation is a new development in the EU, which aims to contribute to the reversal of biodiversity loss. This thesis aims to analyse the current EU legal system protecting forest biodiversity and its weaknesses using the legal doctrinal method. Furthermore, the Nature Restoration Regulation is analysed in light of the weaknesses of the current legislation. Finally, this thesis aims to evaluate the added value the Nature Restoration Regulation would bring to the current EU legislation protecting forest biodiversity.

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# 1 Introduction

## 1.1 Background

Biodiversity in forests is degrading rapidly.<sup>1</sup> The problem of biodiversity loss is multifaceted, with direct and indirect causes.<sup>2</sup> Forests are under pressure from various sources, including climate change, land use change, and overexploitation.<sup>3</sup> Around the world communities depend ‘on forest biodiversity for their lives and livelihoods’.<sup>4</sup> Although the European Union (EU) has set legislation and policies for biodiversity protection, the current legal system is not on track to meet the international targets for biodiversity.<sup>5</sup> Not having met the EU 2020 targets on biodiversity either, the EU legal system faces the challenge of getting back on track to avert biodiversity loss in forests.<sup>6</sup> What makes forests essential for biodiversity targets is that ‘many forests are more biodiverse than other ecosystems’.<sup>7</sup> For example, primary and old-growth forests, which are forests with absent or minimal human activity, have exceptional values in biodiversity conservation through a greater number of species present in these forests in comparison to degraded forests.<sup>8</sup> The focus of this thesis is thus on forests. The

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<sup>1</sup> Bart Muys and others, *Forest Biodiversity in Europe. From Science to Policy* 13 (European Forest Institute 2022) 20. Biological diversity (biodiversity) is defined in the United Nation’s Convention on Biological Diversity as ‘the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems’. (Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) Art 2.)

<sup>2</sup> S Díaz and others (eds), *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 2019) xvi.

<sup>3</sup> Díaz and others (eds) (n 2); FAO and UNEP, *The State of the World’s Forests 2020. Forests, biodiversity and people* (FAO 2020) 82.

<sup>4</sup> FAO and UNEP (n 3) 2.

<sup>5</sup> Daniel Hering and others, ‘Securing success for the Nature Restoration Law’ (2023) 382 *Science* 1248, 1248.

<sup>6</sup> European Environment Agency, *State of nature in the EU: Results from reporting under the nature directives 2013-2018* (Publications Office of the European Union 2020) 128, 135.

<sup>7</sup> FAO and UNEP (n 3) 10.

<sup>8</sup> James E M Watson and others, ‘The exceptional value of intact forest ecosystems’ (2018) 2 *Nature Ecology & Evolution* 599, 601; Commission, ‘Commission Staff Working Document: Commission Guidelines for Defining, Mapping, Monitoring and Strictly Protecting EU Primary and Old-Growth Forests’ SWD (2023) 62 final, 6-7.

legal system is at the centre of biodiversity and forest protection as it simultaneously enables the over-consumption of natural resources but can at the same time safeguard biodiversity.<sup>9</sup>

Internationally, the EU is a party to the Convention on Biological Diversity (CBD).<sup>10</sup> Thus, the 2030 and 2050 goals on biodiversity in the Kunming-Montreal Global Biodiversity Framework adopted by the Conference of the Parties to the CBD apply to the EU.<sup>11</sup> The Framework sets out that ‘by 2030 at least 30 per cent of areas of degraded terrestrial, inland water, and marine and coastal ecosystems are under effective restoration’.<sup>12</sup> Additionally, ‘by 2030 at least 30 percent of terrestrial [...] areas [...] are effectively conserved and managed through ecologically representative, well-connected and equitably governed systems of protected areas and other effective area-based conservation measures’.<sup>13</sup> For 2050, the goal is to have all ecosystems ‘maintained, enhanced or restored, substantially increasing the area of natural ecosystems by 2050’.<sup>14</sup>

Additional international goals can be found in the United Nations (UN) 2030 Agenda for Sustainable Development, which established the Sustainable Development Goals.<sup>15</sup> Goal 15 of the Agenda is to ‘Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, [...] and halt biodiversity loss’.<sup>16</sup> The conservation and restoration of forests was already a goal for 2020.<sup>17</sup> Although the EU is not a party to the UN

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<sup>9</sup> Minna Pappila and Niko Soininen, ‘Ennallistaminen oikeudellisena veloitteena – luontokadon hillinnän valloittamaton rintama Suomen ympäristöoikeudessa’ (2023) 4 *Ympäristöjuridiikka* 23, 24.

<sup>10</sup> ‘List of Parties’ (*Convention on Biological Diversity*) <<https://www.cbd.int/information/parties.shtml>> accessed 8 February 2024.

<sup>11</sup> COP CBD, ‘Decision adopted by the Conference of the Parties to the Convention on Biological Diversity 15/4. Kunming-Montreal Global Biodiversity Framework’ (Kunming-Montreal Global Biodiversity Framework) DEC 15/4 (2022).

<sup>12</sup> *ibid*, Annex, Section H, Target 2.

<sup>13</sup> *ibid*, Annex, Section H, Target 3.

<sup>14</sup> *ibid*, Annex, Section G, Goal A.

<sup>15</sup> United Nations General Assembly, ‘Resolution adopted by the General Assembly on 25 September 2015. Transforming our world: the 2030 Agenda for Sustainable Development’ United Nations General Assembly, 25 September 2015 A/RES/70/1.

<sup>16</sup> *ibid*, Goal 15.

<sup>17</sup> *ibid*, 15.1.

but an observer,<sup>18</sup> the European Commission has voiced its commitment to the 2030 Agenda.<sup>19</sup>

Similarly to these international goals, the EU Biodiversity Strategy 2030, which was created before the Kunming-Montreal Framework, sets out the commitment to ‘[l]egally protect a minimum of 30% of the EU’s land area’ among others.<sup>20</sup> Another commitment in the Strategy is to ‘[s]trictly protect at least a third of the EU’s protected areas, including all remaining EU primary and old-growth forests’.<sup>21</sup> The EU Biodiversity Strategy 2030 does not set a separate 2050 goal but commits to ensuring that the international goal for 2050 is to restore and adequately protect all ecosystems in the world.<sup>22</sup>

In the EU legal system, the core of biodiversity protection is the Natura 2000 network.<sup>23</sup> Established by the Habitats Directive and the Birds Directive, the Natura 2000 network consists of special areas of conservation (SACs) and special protection areas (SPAs), which aim to conserve ecologically special areas.<sup>24</sup> Forest habitat types requiring a special area of conservation are listed in Annex I of the Habitats Directive.<sup>25</sup> These areas are a direct method of protecting forests. Additionally, the Habitats Directive and the Birds Directive provide biodiversity protection through the protection of species. Even though the Habitats Directive is at the heart of the EU legal system, it has its weaknesses.

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<sup>18</sup> ‘Intergovernmental and Other Organizations’ (*United Nations*) <<https://www.un.org/en/about-us/intergovernmental-and-other-organizations>> accessed 22 May 2024.

<sup>19</sup> Commission, ‘Commission Staff Working Document: Delivering on the UN’s Sustainable Development Goals – A comprehensive approach’ SWD (2020) 400 final, 1.

<sup>20</sup> Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Biodiversity Strategy for 2030, Bringing nature back into our lives’ (EU Biodiversity Strategy 2030) COM (2020) 380 final, 5.

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*, 19.

<sup>23</sup> Commission, ‘Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee: The state of nature in the European Union, Report on the status and trends in 2013 – 2018 of species and habitat types protected by the Birds and Habitats Directives’ COM (2020) 635 final, 1.

<sup>24</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive) [1992] OJ L206/7, Art 3; Codified version of the Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (the Birds Directive) [2009] OJ L20/7, Art 4.

<sup>25</sup> The Habitats Directive (n 24) Annex I, s 9.

A recent development in EU law is the Nature Restoration Regulation. The EU Biodiversity Strategy 2030 recognised the need for restoration in the process of fighting biodiversity loss.<sup>26</sup> Thus, the Strategy established that the Commission would propose legally binding nature restoration targets.<sup>27</sup> The Commission adopted a proposal for a regulation on nature restoration in June 2022.<sup>28</sup> After the European Parliament adopted amendments to the proposal in 2023, a legislative resolution on the proposal was adopted by the European Parliament in February 2024 at the first reading.<sup>29</sup> At the time of writing, the Regulation is waiting for the Council’s decision before it can enter into force.<sup>30</sup> According to the Commission, ‘The proposal aims to complement existing environmental policy.’<sup>31</sup> Furthermore, according to the explanatory memorandum to the proposal, it ‘will improve forest biodiversity and resilience’ through its restoration measures.<sup>32</sup> Although the Regulation is not yet in force, this thesis will address the 2024 resolution on the proposal as the Nature Restoration Regulation to differentiate the discussion from the original 2022 proposal and the 2023 Parliamentary amendments. This thesis will look at the Nature Restoration Regulation from a forest protection perspective together with the current EU legal system.

## 1.2 Purpose and Research Questions

The purpose of this thesis is to analyse the EU legal system protecting forest biodiversity within the context of the EU’s commitments to forest biodiversity.<sup>33</sup> Furthermore, this thesis

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<sup>26</sup> EU Biodiversity Strategy 2030 (n 20) 6.

<sup>27</sup> *ibid* 6, 14.

<sup>28</sup> Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on nature restoration’ COM (2022) 304 final.

<sup>29</sup> European Parliament, ‘Amendments adopted by the European Parliament on 12 July 2023 on the proposal for a regulation of the European Parliament and of the Council on nature restoration COM (2022) 304’ Parliament (2023) 277; European Parliament, ‘Nature Restoration: European Parliament legislative resolution of 27 February 2024 on the proposal for a regulation of the European Parliament and of the Council on nature restoration’ (Nature Restoration Regulation 2024) Parliament (2024) 89.

<sup>30</sup> European Parliament, ‘Procedure File 2022/0195(COD)’ (*Legislative Observatory: European Parliament*) <[https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0195\(COD\)&I=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0195(COD)&I=en)> accessed 24 May 2024.

<sup>31</sup> Commission (2022) (n 28) Explanatory Memorandum, 4.

<sup>32</sup> *ibid*.

<sup>33</sup> The Food and Agriculture Organisation of the United Nations (FAO) has defined forest biological diversity as referring ‘to all life forms found within forested areas and the ecological roles they perform. As such, forest biological diversity encompasses not just trees, but the multitude of plants, animals



aims to analyse how the Nature Restoration Regulation would address the weaknesses of the current system. It is important to examine the added value the Nature Restoration Regulation would bring to the EU legislation as little legal research on the 2024 version of the proposal exists. To accomplish this, the research questions this thesis asks and answers are:

1. How does the current EU legal system protect forest biodiversity?
2. What are the weaknesses of the current EU legal system protecting forest biodiversity in the EU?
3. How does the proposal on the Nature Restoration Regulation address the weaknesses of the current EU legislation protecting forest biodiversity?
4. How would the proposal on the Nature Restoration Regulation add value to the current EU legislation protecting forest biodiversity in the EU?

### **1.3 Methodology**

The methodology used in this thesis is the legal doctrinal methodology. Following this, to answer the first research question, the current EU law on the protection of forest biodiversity will be described. The sources used to describe and analyse the current EU law can be divided into legislative sources, case law, and literature. The Habitats Directive and the Birds Directive are the main legislative sources. Furthermore, policy documents such as the EU Biodiversity Strategy 2030 and the EU Forest Strategy 2030 and the relevant case law interpreting the legislation are used.<sup>34</sup> The literature for analysing the current EU law can be divided into legal and scientific sources. The legal literature sources used include articles from Kokko and Hoek, who have examined the current legislation and its weaknesses in light of the original proposal on the Nature Restoration Regulation from a more general perspective. As for scientific literature, articles from Sabatini and others as well as reports

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and microorganisms that inhabit forest areas and their associated genetic diversity'. (FAO and UNEP, *The State of the World's Forests 2020. Forests, biodiversity and people* (FAO 2020) 3.)

<sup>34</sup> Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: New EU Forest Strategy for 2030' (EU Forest Strategy 2030) COM (2021) 572 final.

from the European Environmental Agency and the European Forest Institute are examples of sources used for the analysis.

To answer the second research question, the weaknesses of the EU legal system are identified in light of the objectives and purpose of the current legislation thus following the general rule of interpretation for treaties.<sup>35</sup> Under the Vienna Convention on the Law of Treaties, the general rule of interpretation establishes that treaty interpretation is to be ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’.<sup>36</sup> For the analysis of the weaknesses of the current EU legal system, the reference points used for the analysis are the targets set in the EU Biodiversity Strategy 2030 and in the international agreements the EU is a party to. Together with the academic literature, these facilitate the analysis of the weaknesses of the current EU legal system protecting forest biodiversity.

For the 2024 Nature Restoration Regulation, the discussion refers to the current EU legislation as well as the 2022 Commission proposal and the 2023 Parliamentary amendments. The current EU legislation is the point of referral when answering the third research question as the Nature Restoration Regulation is compared to the current system. Due to the Nature Restoration Regulation not having entered into force at the time of writing, no wide array of academic literature on the Regulation and especially on its relation to biodiversity and forests exists. The existing literature has focused either on the 2022 Commission proposal or the 2023 amendments made by the European Parliament. Nevertheless, articles by Hoek as well as Pappila and Soininen are key sources for the discussion. Academic literature on the newest version from 2024 has not yet been published. Therefore, the other sources primarily used for the analysis of the Regulation are the different versions of the proposal itself. Furthermore, the preamble of the Nature Restoration Regulation is used for its interpretation following the general rule of interpretation.<sup>37</sup> For the fourth research question, the analysis of the current EU legislation and the Nature Restoration

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<sup>35</sup> Vienna Convention on the Law of Treaties 1969, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) Art 31(1).

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*, Art 31(2).

Regulation are combined to evaluate the added value the Regulation would bring to the current EU legislation.

## 1.4 Limitations and definitions

There are multiple reasons for forest biodiversity loss.<sup>38</sup> Consequently, the EU has adopted several legislative acts which can aid in reducing forest biodiversity loss by addressing the different reasons behind it with regulation.<sup>39</sup> However, this thesis will only look at the two Nature Directives, the Habitats Directive and the Birds Directive as well as the proposal on the Nature Restoration Regulation and their relation to forest biodiversity. The main analysis has been limited to the weaknesses of the current legal system in the Habitats Directive and how the Nature Restoration Regulation would address these. The Habitats Directive is the focus of the weaknesses due to it being designed to protect forests. The Nature Restoration Regulation includes provisions concerning the restoration of multiple different areas and ecosystems. Several of these provisions have been excluded from the discussion due to their irrelevance to forests.

To have a full understanding of the terms used in this thesis, conservation, restoration, and protection should be defined. Conservation can be defined to include a duty ‘to maintain natural sites which are (still) present’.<sup>40</sup> Restoration instead ‘means the process of actively or passively assisting the recovery of an ecosystem in order to improve its structure and

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<sup>38</sup> See Ch 1.1.

<sup>39</sup> See for example Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 [2023] OJ L150/206; Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU [2018] OJ L156/1.

<sup>40</sup> Niels Hoek, ‘A Critical Analysis of the Proposed EU Regulation on Nature Restoration: Have the Problems Been Resolved?’ [2022] *European Energy and Environmental Law Review* 320, 321 citing Eric Higgs, *Nature by Design: People, Natural Process, and Ecological Restoration* 108 (MITT PRESS 2003).

functions, with the aim of conserving or enhancing biodiversity and ecosystem resilience'.<sup>41</sup>  
Protection is defined as the 'preservation from harm, danger [or] damage'.<sup>42</sup>

## 1.5 Structure

The structure of the thesis is as follows. Chapter 2 will set out the current EU law relating to the protection of forest biodiversity. Chapter 3 will move on to analyse the weaknesses of the current EU legal system protecting forest biodiversity. Following this, Chapter 4 will describe the Nature Restoration Regulation and analyse it from the forest biodiversity perspective on how the Regulation addresses the weaknesses of the current EU legislation. In Chapter 5, the added value of the Nature Restoration Regulation to the current EU legislation will be evaluated. Finally, Chapter 6 will conclude the thesis by bringing in the findings.

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<sup>41</sup> The Nature Restoration Regulation 2024 (n 29) Art 3(3).

<sup>42</sup> *Oxford English Dictionary*, 'protection' (OUP) <[https://www.oed.com/dictionary/protection\\_n](https://www.oed.com/dictionary/protection_n)> accessed 29 April 2024.

## 2 The current protection of forests

### 2.1 The EU competence

This Chapter will describe the current EU law protecting forest biodiversity. Describing the relevant legal framework will enable a more in-depth discussion later. This Chapter will begin by setting out the legal basis for the EU's competence on the environment and forestry under the Treaty on the Functioning of the European Union. After that, the Chapter will move on to secondary EU legislation, namely the Habitats Directive and the Birds Directive. They will be described to explain how the current EU law addresses the protection of forest biodiversity. The species protection in the Habitats Directive and the Birds Directive is discussed to further show the differences in the protection provided for forests and species.

The EU and its Member States share the competence on matters about the environment.<sup>43</sup> However, the Treaty on the Functioning of the European Union is silent on the competence regarding forestry.<sup>44</sup> Due to this, there is no common forestry policy in the EU.<sup>45</sup> EU policies can nevertheless have an impact on forestry, for example through the EU Forest Strategy 2030, as well as through the Nature Directives; the Habitats Directive and the Birds Directive, which will be described later.<sup>46</sup> The overarching aim of the EU environmental policy is a high level of protection.<sup>47</sup> Relevantly to the protection of biodiversity in forests, the EU environmental policy is to contribute to the preservation, protection, and improvement of the quality of the environment among other objectives.<sup>48</sup> In achieving this objective, the Habitats Directive and the Birds Directive are in a key role.<sup>49</sup> These two Directives will be discussed next.

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<sup>43</sup> Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/47, Art 4(2)(e).

<sup>44</sup> *ibid*, Arts 3-6.

<sup>45</sup> Vera Milicevic, 'The European Union and forests' (*Fact Sheets on the European Union*, European Parliament 2023) <<https://www.europarl.europa.eu/factsheets/en/sheet/105/the-european-union-and-forests>> accessed 22 May 2024.

<sup>46</sup> *ibid*.

<sup>47</sup> TFEU (n 43) Art 191(2).

<sup>48</sup> *ibid*, Art 191(1).

<sup>49</sup> An Cliquet, 'EU Nature Conservation Law: Fit for Purpose' in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar 2020) 267.

## 2.2 The Habitats Directive

### 2.2.1 The objectives of the Habitats Directive

As beforementioned, the Habitats Directive and the Birds Directive form the core of biodiversity protection in the EU. The Directives create obligations on Member States to act in a certain way and to prohibit specific activities.<sup>50</sup> The aim of the Habitats Directive is ‘to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies’.<sup>51</sup> Furthermore, the measures of the Habitats Directive are ‘to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest’.<sup>52</sup> The conservation status for natural habitats is defined in Article 1(e).<sup>53</sup> There are two ways the Habitats Directive sets out to achieve its aims; the Natura 2000 network and species protection.<sup>54</sup> These will be described next.

### 2.2.2 Area protection through the Natura 2000 network

The Natura 2000 network is meant to enable the maintenance or restoration of the natural habitat types and the habitats of species within the Natura 2000 sites.<sup>55</sup> The habitat types and habitats of species included in the network are listed in separate Annexes.<sup>56</sup> The focus of this thesis is on EU forests and the protection of biodiversity within them as explained before. Forest types such as Western Taiga are listed in Annex I of the Habitats Directive therefore

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<sup>50</sup> *ibid* 266.

<sup>51</sup> The Habitats Directive (n 24) Art 2(1).

<sup>52</sup> *ibid*, Art 2(2).

<sup>53</sup> Conservation status is defined as ‘the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species’. It is favourable when the covered natural range and area are increasing or stable, ‘the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future’ and the typical species of the habitat has a favourable conservation status. (The Habitats Directive (n 24) Art 1(e).)

<sup>54</sup> The Habitats Directive (n 24) Arts 3(1), 12, 13.

<sup>55</sup> *ibid*, Art 3(1).

<sup>56</sup> *ibid*, Art 3(1). Natural habitats are ‘terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural’ while habitat of species is defined as ‘an environment defined by specific abiotic and biotic factors, in which the species lives at any stage of its biological cycle’. (The Habitats Directive (n 24) Art 1(b), (f).)

belonging to the natural habitat types which are of community interest and require a special area of conservation.<sup>57</sup> Within the natural habitat types in the Habitats Directive, certain habitat types have been allocated as priority habitat types.<sup>58</sup> These habitat types are ‘in danger of [disappearance]’ and there is a ‘particular responsibility’ to conserve these habitats.<sup>59</sup> Multiple forest habitats are listed as priority habitats in Annex I.<sup>60</sup>

With the Natura 2000 network, the protection of habitat types in the Habitats Directive is based on area protection. Special areas of conservation (SACs) for natural habitat types are created based on the Member States’ list of sites hosting the habitats listed in Annex I of the Directive.<sup>61</sup> Even though the Natura 2000 network is designed also to restore the habitat types, the Habitats Directive does not have specific obligations on restoration within Natura 2000.<sup>62</sup>

Under Article 6(1) Member States are obliged to ‘establish the necessary conservation measures’ for the SACs which are to include suitable management plans when needed.<sup>63</sup> Furthermore, Member States are obliged to ‘take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species’.<sup>64</sup> The European Court of Justice (ECJ) has specified that with Article 6(2) of the Habitats Directive, the measures to avoid deterioration or disturbance should not wait for the deterioration or disturbance to take place.<sup>65</sup>

While the management of the Natura 2000 sites needs to contribute to conservation, different activities can be allowed within Natura 2000 forests, for example, timber production.<sup>66</sup>

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<sup>57</sup> *ibid*, Annex I, s 9.

<sup>58</sup> *ibid*, Art 1(d), Annex I.

<sup>59</sup> *ibid*, Art 1(d).

<sup>60</sup> *ibid*, Annex I, s 9.

<sup>61</sup> *ibid*, Art 4(1).

<sup>62</sup> *ibid*, Arts 2(2), 3(1).

<sup>63</sup> *ibid*, Art 6(1).

<sup>64</sup> *ibid*, Art 6(2).

<sup>65</sup> Case C- 418/04 *Commission v Ireland* [2007] ECR I-10947, para 208; H Schouken, ‘Non-Regression Clauses in Times of Ecological Restoration Law: Article 6(2) of the EU Habitats Directive as an unusual ally to restore Natura 2000?’ (2017) 13 *Utrecht Law Review* 124, 134; Commission, *Managing Natura 2000 sites: The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC* (Publications Office of the European Union 2019) 25.

<sup>66</sup> The Habitats Directive (n 24) Art 6(3); Commission, *Natura 2000 and Forests Part I-II* (Office for Official Publications of the European Communities 2015) 58.

However, if the plan or project is ‘not directly connected with or necessary to the management of the site’ but is likely to significantly affect the protected site, ‘either individually or in combination with other plans or projects’, it needs to undergo an appropriate assessment.<sup>67</sup> The national authorities can approve the plan or project only after it is certain that there will be no adverse effects.<sup>68</sup> The ECJ has held that this certainty is interpreted as meaning that ‘no reasonable scientific doubt remains as to the absence of such effects’.<sup>69</sup> Thus with the appropriate assessment and the authorisation of plans and projects, the precautionary principle is implemented through Article 6(3) of the Habitats Directive therefore protecting the Natura 2000 sites from harmful effects.<sup>70</sup>

The appropriate assessment of Article 6(3) ensures that while conservation is the main objective of the Natura 2000 network, forestry is not hindered where it is deemed either directly connected or necessary to the management, or it passes the appropriate assessment. Indeed, the Commission has stated that Natura 2000 forests can ‘be managed with a view to achieving multiple functions’ such as timber production together with nature protection.<sup>71</sup> However, according to the ECJ, if the forest management operations do not set out conservation objectives and measures for the site, they constitute a ‘plan’ under Article 6(3) of the Habitats Directive and are subject to an appropriate assessment if they are likely to have a significant effect.<sup>72</sup> Therefore, even the directly connected and necessary management measures need to consider the conservation of the site. Although forestry activities may be allowed in Natura 2000 sites, they need to be in accordance with Article 6(3) of the Habitats Directive which creates protection for forest biodiversity.

Article 6(4) grants that even if the appropriate assessment is negative, where the plan or project is of an overriding public interest, it can be executed if there are no alternative solutions.<sup>73</sup> The ECJ has stated that for Article 6(4), ‘the implementation of a plan or project

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<sup>67</sup> The Habitats Directive (n 24) Art 6(3).

<sup>68</sup> *ibid*, Art 6(3).

<sup>69</sup> Case C-127/02 *Waddenvereniging and Vogelsbeschermingvereniging (Waddenzee)* [2004] ECR I-07405, para 61.

<sup>70</sup> Case C-441/17 *European Commission v Republic of Poland (Białowieża)* [2018] OJ C200/20, para 118

<sup>71</sup> Commission, *Natura 2000 and Forests Part I-II* (n 66) 58.

<sup>72</sup> *Białowieża* (n 70) paras 123-124, 127.

<sup>73</sup> The Habitats Directive (n 24) Art 6(4).



must be both ‘public’ and ‘overriding’’.<sup>74</sup> With priority natural habitat types and species, the justifications for a plan or project to take place despite a negative assessment are more specific.<sup>75</sup> In the situation that the plan or project is carried out under Article 6(4), Member States are obligated to take compensatory measures to protect ‘the overall coherence of Natura 2000’.<sup>76</sup> This creates an attempt to mitigate the adverse effects by the protection of coherence. The Natura 2000 sites under the Habitats Directive are in summary a direct way of protecting forests by focusing on their conservation through area-based measures. The next section will describe the species protection within the Habitats Directive.

### 2.2.3 Species protection

The second way the Habitats Directive sets out to conserve biodiversity is through species protection. When it comes to species protection in the Habitats Directive, Article 12 establishes a strict protection system for animal species in Annex IV(a) of the Directive while Article 13 concerns the strict protection of plant species in Annex IV(b).<sup>77</sup> Thus similarly to the habitat types under the Natura 2000 network, species protection in the Habitats Directive follows an Annex-based system. The Articles list prohibited actions such as deliberate disturbance of animal species and the ‘deterioration or destruction of breeding sites or resting places’ as well as deliberate picking of the strictly protected plants.<sup>78</sup>

Importantly, species protection in the Habitats Directive is not concentrated on the area-based measures of the Natura 2000 network but on the species themselves and actions harmful to them. This can cause indirect protection for forests if for example forestry operations would constitute a disturbance to the species and fall under the prohibited actions of Article 12(1). This was the case in *Skydda Skogen* where the ECJ held that forestry work can fall under the prohibitions of Article 12(1)(a) to (c).<sup>79</sup> As for the protection of breeding sites and resting places under Article 12(1)(d), the *Białowieża* judgment held that the forestry in question fell

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<sup>74</sup> Case C-182/10 *Solvay and Others* [2012] OJ C179/18, para 75.

<sup>75</sup> The Habitats Directive (n 24) Art 6(4).

<sup>76</sup> *ibid*, Art 6(4).

<sup>77</sup> *ibid*, Arts 12, 13.

<sup>78</sup> *ibid*, Arts 12(1)(b), (d), 13(1)(a).

<sup>79</sup> Case C-473/19 *Föreningen Skydda Skogen v Länsstyrelsen i Västra Götlands län (Skydda Skogen)* [2021] OJ C163/6, para 53.

under the provision.<sup>80</sup> The protection for the breeding sites and resting places under Article 12(1)(d) applies regardless of the number of species present in the site.<sup>81</sup> In the *Białowieża* case, the ECJ stated that ‘the system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature’.<sup>82</sup> Therefore simply having the legislation in place in the Member State is not enough.<sup>83</sup> Species protection in the Habitats Directive thus provides indirect protection to forests by protecting both the species and their breeding sites and resting places.

Article 16 of the Habitats Directive sets out a possibility to derogate from the strict protection system of species. The possibility is only if ‘there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status’.<sup>84</sup> A further listed reason from the subsections of Article 16(1) of the Directive is needed for the derogation. For example, under Article 16(1)(b) the prevention of serious damage to forests can be a reason for derogation.

Significantly, to derogate from the strict protection system of species, the derogation cannot be detrimental to the favourable conservation status.<sup>85</sup> The requirement is not the same for habitat types under Article 6 of the Directive, which does not explicitly mention the favourable conservation status. The ECJ has held that the prohibitions under Article 12(1) of the Habitats Directive do not cease to apply even if a species has a favourable conservation status.<sup>86</sup> Although favourable conservation status is one of its objectives, the Habitats Directive does not set clear deadlines for the maintenance or restoration of it.<sup>87</sup> The next section will describe the forest protection outside the Natura 2000 network.

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<sup>80</sup> *Białowieża* (n 70) paras 236, 238.

<sup>81</sup> *ibid*, para 237.

<sup>82</sup> *ibid*, para 231.

<sup>83</sup> *ibid*.

<sup>84</sup> The Habitats Directive (n 24) Art 16(1).

<sup>85</sup> *ibid*, Art 16(1).

<sup>86</sup> *Skydda Skogen* (n 79) para 66.

<sup>87</sup> Kai Kokko, ‘Ennallistaminen ympäristöoikeuden sektoreilla – luonnonsuojelu’ (2023) 4 *Ympäristöjuridiikka* 47, 51.

## 2.2.4 Forest protection outside the Natura 2000 sites

Where the species protection extends outside the Natura 2000 network and protects forests indirectly, the obligations to protect habitat types outside the Natura 2000 sites are weak in the Habitats Directive. Article 10 of the Habitats Directive somewhat extends the scope of the Directive outside the Natura 2000 network by aiming for the improvement of the ecological coherence of the Natura 2000 network.<sup>88</sup> When necessary, ‘Member States shall endeavour [...] in their land-use planning and development policies [...] to encourage the management of features of the landscape which are of major importance for wild fauna and flora’.<sup>89</sup> Article 10 is referred to in Article 3(3) of the Habitats Directive which is similar to Article 10. Article 3(3) of the Habitats Directive states that where the Member States consider necessary, they ‘shall endeavour to improve the ecological coherence of Natura 2000 by maintaining, and where appropriate developing features of the landscape which are of major importance for wild fauna and flora, as referred to in Article 10’. Article 10 together with Article 3(3) are therefore examples of considerations Member States should give to the areas outside of the Natura 2000 network.

Yet, Articles 10 and 3(3) create uncertainties.<sup>90</sup> The Articles leave room for interpretation on whether Member States are under an obligation to take protection measures outside the Natura 2000 network. Although measures can be taken outside the network, the provisions of Articles 3(3) and 10 are vague in setting possible obligations and their relation to the protection of forests. The discretion left to the Member States is therefore large.<sup>91</sup> Combined with the area-based protection of forest habitat types which focuses on the Natura 2000 sites, the Habitats Directive lacks direct obligations for the protection of forest habitat types outside the Natura 2000 network. The next section will first describe the protection provided by the Birds Directive.

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<sup>88</sup> The Habitats Directive (n 24) Art 10.

<sup>89</sup> *ibid.*

<sup>90</sup> L Squintani, ‘The Development of Ecological Corridors: Member States’ Obligation under the Habitats and Birds Directives?’ (2012) 9.2 *Journal for European Environmental & Planning Law* 180, 186.

<sup>91</sup> Geert van Hoorik, ‘Biodiversity outside protected areas: An outlaw waiting to be saved?’ in Charles-Hubert Born and others (eds), *The Habitats Directive in its EU Environmental Law Context: European Nature’s Best Hope?* (Routledge 2015) 458.

## 2.3 The Birds Directive

The Habitats Directive complements the biodiversity protection of the older Birds Directive which covers the conservation of wild birds. The Directive applies to the habitats of birds, to the birds themselves as well as to their eggs and nests.<sup>92</sup> The Birds Directive does not apply to the protection of habitat types and therefore does not directly protect forests. Nevertheless, the Birds Directive is relevant to be described as it provides indirect protection to forests and offers a comparative framework for the indirect protection provided by species protection in the Habitats Directive.

Similarly to the Habitats Directive, the Birds Directive approaches the protection of species' habitats through area protection. The species' habitats under the Birds Directive are conserved and maintained through the creation of special protection areas (SPAs) for the Annex I species.<sup>93</sup> Similar measures are needed 'for regularly occurring migratory species not listed in Annex I'.<sup>94</sup> The obligations of Article 6(2), (3), and (4) of the Habitats Directive apply to the SPAs under the Birds Directive as well.<sup>95</sup> Additionally, the Member States are required to 'strive to avoid pollution or deterioration of habitats' outside of the protected areas.<sup>96</sup> This is significant as no similar provision exists in the Habitats Directive. Although Articles 3(3) and 10 of the Habitats Directive consider areas outside the Natura 2000, they are silent on pollution and deterioration.

Under Article 5 of the Birds Directive, the EU Member States are required 'to establish a general system of protection for all species of birds'.<sup>97</sup> Article 5 prohibits for example the 'deliberate destruction of, or damage to, [the] nests and eggs or removal of [the] nests' of birds as well as the 'deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive'.<sup>98</sup> With these prohibitions Article 5 of the Birds Directive is

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<sup>92</sup> The Birds Directive (n 24) Art 1(2).

<sup>93</sup> *ibid*, Art 4(1).

<sup>94</sup> *ibid*, Art 4(2).

<sup>95</sup> The Habitats Directive (n 24) Art 7.

<sup>96</sup> The Birds Directive (n 24) Art 4(4).

<sup>97</sup> *ibid*, Art 5.

<sup>98</sup> *ibid*, Art 5(b), (d).

comparable to Article 12 of the Habitats Directive. The ECJ has held that the prohibition of Article 5(b) and (d) are ‘intended in essence to protect the breeding sites and resting places of the birds covered by that directive’.<sup>99</sup> As Article 5 is applicable to all birds under Article 1, it is not limited to protection within the Natura 2000 network.

The ECJ has held that Member States cannot exempt forestry from the prohibitions of Article 5 but need to follow the derogation criteria of the Birds Directive.<sup>100</sup> Article 9 of the Directive allows the Member States to derogate from the obligations of Article 5 for listed reasons and if no satisfactory alternative solutions are available.<sup>101</sup> Preventing serious damage to forests is one reason for derogating under Article 9(1)(a) of the Birds Directive, similar to Article 16(1)(b) of the Habitats Directive.

Therefore, the Birds Directive uses area-based measures as one method of protection through the SPAs, but it also sets out provisions which are applicable outside the Natura 2000 network.<sup>102</sup> The Birds Directive is not limited to its Annexes in what is protected through the general system of protection in Article 5. The following section will further analyse the species protection both in the Habitats Directive and the Birds Directive in comparison to the protection of habitat types.

## 2.4 Species can indirectly protect forests

The animal species protection in the Habitats Directive and the Birds Directive can be divided into two categories. Firstly, species are protected through their habitats, either with the SACs of the Habitats Directive or with the SPAs of the Birds Directive.<sup>103</sup> Secondly, animal species can be protected through the strict protection system of the Habitats Directive and the general system of protection in the Birds Directive.<sup>104</sup> Both of these methods are capable of protecting forests indirectly. Where the habitat of the species is a forest, the SAC or SPA established for the species can indirectly protect the forest too. If certain activities are prohibited in the area

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<sup>99</sup> *Białowieża* (n 70) para 252.

<sup>100</sup> Case 412/85 *Commission v Germany* [1987] ECR 03503, paras 14-18.

<sup>101</sup> The Birds Directive (n 24) Art 9(1).

<sup>102</sup> *ibid*, Art 4(4), 5.

<sup>103</sup> The Habitats Directive (n 24) Art 3(1); the Birds Directive (n 24) Art 4.

<sup>104</sup> The Habitats Directive (n 24) Art 12; the Birds Directive (n 24) Art 5.

for the protection of the species, they ultimately can protect the forest.<sup>105</sup> Similarly, where the species itself is protected, and cannot be for example disturbed, this too can protect forests where a harmful activity for example to the forest would disturb the species.<sup>106</sup>

The protection of species in the two Directives is significantly different to the protection of habitat types. The protection of habitat types follows area-based protection through the SACs in the Habitats Directive. At the same time, species protection is not necessarily limited to a specific area as explained above. Annex IV of the Habitats Directive lists the species which are under the strict protection system and the Birds Directive applies to all naturally occurring wild bird species and creates a general system of protection.<sup>107</sup> Therefore, this type of species protection in the two Directives is not limited to the Natura 2000 network but protects the species also outside the network. The species protection is thus extended to a wider area scope. No similar general protection of habitat types exists in the Habitats Directive. Where the Habitats Directive and the Birds Directive have systems of protection for species outside the Natura 2000 network, the Habitats Directive limits the forest protection to the listed forests in Annex I and Natura 2000 sites.<sup>108</sup> This leads to deficiencies in the current EU legal system for forest habitat type protection.

The EU legal system thus protects forest biodiversity in the two Nature Directives through the protection of habitats and species. Forests themselves are directly protected through the protection of habitat types in the special areas of conservation of the Habitats Directive. However, this protection is concentrated on the designated Natura 2000 sites with a lack of direct obligations to protect habitat types outside the Natura 2000 network. The focus is further limited to the listed habitat types of Annex I. The next Chapter will analyse the weaknesses of the current legal system further.

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<sup>105</sup> See Ch 2.2.3.

<sup>106</sup> The Habitats Directive (n 24) Art 12(1)(b); the Birds Directive (n 24) Art 5(d).

<sup>107</sup> The Habitats Directive (n 24) Annex IV; the Birds Directive (n 24) Arts 1, 5.

<sup>108</sup> The Birds Directive (n 24) Arts 1(1), 5; the Habitats Directive (n 24) Art 3(1).

### **3 The weaknesses of the current EU legislation protecting forest biodiversity**

This Chapter will analyse the weaknesses of the current EU law protecting forest biodiversity in the EU. The focus is mainly on the Habitats Directive as it is the primary instrument designed to protect forests. The first weakness analysed will continue the earlier discussion on the protection of biodiversity in forests outside the Natura 2000 network. Secondly, the limitations of the Annex-based system of the Habitats Directive will be analysed. Finally, this Chapter will examine the lack of target deadlines for the achievement of the objectives in the Habitats Directive.

#### **3.1 Obligations outside the Natura 2000 sites are weak**

The first weakness of the current EU legislation analysed here concerns the protection and restoration of habitat types outside the Natura 2000 sites. In 2020, 45.1% of the EU land was forests or other wooded land.<sup>109</sup> The Natura 2000 network covers only 18.6% of the land area in the EU.<sup>110</sup> This is significantly low as ‘Annex I forest habitats cover about 27% of all forested area in the EU.’<sup>111</sup> Even though almost 50% of the Natura 2000 network is forests,<sup>112</sup> many forests and thus biodiversity is left outside the network. The Habitats Directive’s obligations outside the Natura 2000 network are thus looked at in this section.

Whereas the species provisions under the Habitats Directive and the Birds Directive offer species protection outside the Natura 2000 network, the EU Member States are not under a similar obligation regarding the protection of habitat types in the Habitats Directive. Instead,

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<sup>109</sup> Eurostat, *Agriculture, forestry and fishery statistics: 2020 edition* (Publication Office of the European Union 2020) 87.

<sup>110</sup> European Environment Agency, ‘Natura 2000 sites designated under the EU Habitats and Birds Directives’ (EEA, 22 November 2022) <<https://www.eea.europa.eu/en/analysis/indicators/natura-2000-sites-designated-under?activeAccordion=ecdb3bcf-bbe9-4978-b5cf-0b136399d9f8>> accessed 29 April 2024.

<sup>111</sup> EU Forest Strategy 2030 (n 34) 1.

<sup>112</sup> European Environment Agency, *The European environment – state and outlook 2020: Knowledge for transition to a sustainable Europe* (Publications Office of the European Union 2019) 77.

with habitat types, the focus is on the special areas of conservation under Natura 2000.<sup>113</sup> Even though Article 10 and Article 3(3) of the Habitats Directive provide for the Member States to consider measures outside the Natura 2000 network, they do not create any concrete obligations leading them to be weak provisions.<sup>114</sup> The scope of the species protection in both the Habitats Directive and the Birds Directive extending to areas beyond the Natura 2000 network and indirectly protecting forests does not provide significant aid either as the focus of the protection measures is still on the species.

Thus, there is a lack of direct obligations to protect forests outside Natura 2000. This is significant considering the EU goals on protected areas. The EU Biodiversity Strategy 2030 sets out the commitment to ‘[l]egally protect a minimum of 30% of the EU’s land area’.<sup>115</sup> The Strategy calls for a widening of protected areas as the current network is not considered sufficiently large.<sup>116</sup> According to the EU Biodiversity Strategy 2030, the additional protected areas designated by the Member States should be done either through the Natura 2000 network or national protection schemes.<sup>117</sup> Without the Habitats Directive setting out legal obligations for forest protection outside the existing network through other protection areas such as national schemes, achieving this goal with the Habitats Directive would rely on increasing the Natura 2000 network. With the current 18.6% coverage as mentioned above, the Natura 2000 network would have to nearly double in size to reach the 30% protection if national protection areas would be excluded from the calculation.

Furthermore, the Habitats Directive does not set specific obligations on restoring ecosystems outside of Natura 2000 sites.<sup>118</sup> The measures taken under the Directive are to restore habitats at a favourable conservation status and the Natura 2000 network is to enable this restoration where it is appropriate.<sup>119</sup> However, there is a lack of focus and a lack of obligations on restoration inside and outside the Natura 2000 network. The Commission has recognised this weakness, and the original proposal on the Nature Restoration Regulation has an intention

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<sup>113</sup> The Habitats Directive (n 24) Art 3(1).

<sup>114</sup> See Ch 2.2.1.

<sup>115</sup> EU Biodiversity Strategy 2030 (n 20) 5.

<sup>116</sup> *ibid*, 3.

<sup>117</sup> *ibid*, 4.

<sup>118</sup> Kokko (n 87) 51.

<sup>119</sup> The Habitats Directive (n 24) Arts 2(2), 3(1).



behind it to address restoration within the Natura 2000 network and outside it.<sup>120</sup> The 2050 goal of the Kunming-Montreal Global Biodiversity Framework is the restoration of all ecosystems by 2050, which would consequently include the restoration of all EU ecosystems.<sup>121</sup> Without the Habitats Directive setting out legal obligations outside the Natura 2000 network on the restoration of all ecosystems, achieving this international target by the EU does not seem feasible through the Habitats Directive. Having failed to meet the 2020 targets<sup>122</sup> with the Habitats Directive, and the 2030 quickly approaching, there is a need for reform in the EU legislation protecting forest biodiversity.

Thus, the lack of obligations outside the Natura 2000 network directly protecting and restoring forests is a weakness in the Habitats Directive. As the Habitats Directive is primarily focused on the protection of forests through the Natura 2000 network and the special areas of conservation, it only protects those habitat types covered in Annex I of the Directive.<sup>123</sup> Therefore, the protection given by the Habitats Directive to forests is limited to the listed habitats and designated areas. This is a weakness in the forest biodiversity protection. The Annex-based system of the Directive will be discussed next.

## **3.2 The Annex-based system creates limitations**

### **3.2.1 Limited coverage of protected habitat types**

The Habitats Directive operates on an Annex-based system through which habitats can be protected under the Natura 2000 network.<sup>124</sup> As the Member States need to contribute to the network only through a proportion of habitats and habitats of species present in their territory according to Article 3(2) of the Habitats Directive, the mere inclusion of habitats in the Annexes does not protect them. Annex I of the Habitats Directive covers natural habitat types and Annex II of the Directive lists habitats of species. This selection of habitat types in Annex

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<sup>120</sup> Commission (2022) (n 28) Explanatory Memorandum, 8.

<sup>121</sup> Kunming-Montreal Global Biodiversity Framework (n 11) Annex, Section G, Goal A.

<sup>122</sup> European Environment Agency, *State of nature in the EU: Results from reporting under the nature directives 2013-2018* (Publications Office of the European Union 2020) 128, 135.

<sup>123</sup> The Habitats Directive (n 24) Art 3(1); Niels Hoek, 'A Critical Analysis of the Proposed EU Regulation on Nature Restoration: Have the Problems Been Resolved?' [2022] *European Energy and Environmental Law Review* 320, 323.

<sup>124</sup> The Habitats Directive (n 24) Art 3(1).

It limits the biodiversity coverage of the Directive's measures to the selected habitats. This is a weakness of the Directive as it restricts what is covered by the protection.<sup>125</sup> The Annex-based system and Article 3(2) of the Habitats Directive thus limit the coverage of habitat types protected within the Member States therefore limiting the protection of forests.

### **3.2.2 Primary and old-growth forests are not mentioned**

A consequence of the Annex-based system is that there are forests which can be left out of the protection under the Habitats Directive. Namely, the Habitats Directive does not explicitly mention primary and old-growth forests.<sup>126</sup> Primary and old-growth forests can be summarised to mean forests where human activities are either not visible, or they are limited or disappearing.<sup>127</sup> According to a report by the Joint Research Centre, the European Commission's science and knowledge service, which gathered information from different sources, the estimated area of primary forests in the EU is between 2% and 3%.<sup>128</sup> Most of these forests are concentrated in Sweden, Bulgaria, Finland, and Romania.<sup>129</sup> Although Europe only hosts a small extent of primary and old-growth forests, they are significant for biodiversity conservation.<sup>130</sup> Consequently, the small number of these forests left in Europe makes them even more important to be legally protected. Together with the lack of obligations for protection outside the Natura 2000 network in the Habitats Directive, and without the inclusion of primary and old-growth forests in the Directive, the Directive does not protect these forests where they are located outside the network. Furthermore, there is no indirect protection for primary and old-growth forests in the species protection provisions of

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<sup>125</sup> Hoek (n 123) 323.

<sup>126</sup> The Habitats Directive (n 24); Jessica Stubenrauch and Beatrice Garske, 'Forest protection in the EU's renewable energy directive and nature conservation legislation in light of the climate and biodiversity crisis – Identifying legal shortcomings and solutions' (2023) 153 *Forest Policy and Economics*, 1, 7.

<sup>127</sup> Commission, 'Commission Staff Working Document: Commission Guidelines for Defining, Mapping, Monitoring and Strictly Protecting EU Primary and Old-Growth Forests' SWD (2023) 62 final, 6-7.

<sup>128</sup> Commission and others, *Mapping and assessment of primary and old-growth forests in Europe* (Publications Office of the European Union 2021) 11.

<sup>129</sup> *ibid.*

<sup>130</sup> *ibid.*, 9.

the Habitats Directive or the Birds Directive, unless they constitute breeding sites or resting places for the protected species.<sup>131</sup>

Strict protection of ‘all remaining EU primary and old-growth forests’ is a commitment under the EU Biodiversity Strategy 2030.<sup>132</sup> This is additionally emphasised in the EU Forest Strategy 2030.<sup>133</sup> The inclusion of primary and old-growth forests is a new goal for the EU as neither were mentioned in the 2020 EU Biodiversity Strategy.<sup>134</sup> Sabatini and others have found that many of these forests have been unprotected in Europe.<sup>135</sup> The European Forest Institute has stated that to protect biodiversity in primary and old-growth forests, full protection of the forests is ‘[t]he most effective way’.<sup>136</sup> A report from the European Commission claims that ideal conservation for primary and old-growth forests would be ‘a functionally connected network of strict forest reserves, aimed at integrating all small and isolated primary and old-growth patches, with adequately managed buffer zones and corridors’.<sup>137</sup>

As a network of protected sites, Natura 2000 could have an opportunity to conserve the remaining primary and old-growth forests and thus increase forest biodiversity protection. Including primary and old-growth forests in the Habitats Directive and widening the Annex-based system could aid in achieving their protection. However, when considering Article 3(2) of the Habitats Directive, the Member States’ contribution to the Natura 2000 network is ‘in proportion to the representation within its territory of the natural habitat types and the habitats of species’ under Annexes I and II. Thus, the inclusion of habitat types in Annex I does not automatically ensure their protection as not all Annex I habitat types present on the Member State’s territory need to be protected.

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<sup>131</sup> The Habitats Directive (n 24) Art 12(1)(d); the Birds Directive (n 24) Art 5(d).

<sup>132</sup> EU Biodiversity Strategy 2030 (n 20) 5.

<sup>133</sup> EU Forest Strategy 2030 (n 34) 11.

<sup>134</sup> Commission, ‘Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Our life insurance, our natural capital: an EU biodiversity strategy to 2020’ (EU Biodiversity Strategy 2020) COM (2011) 244 final.

<sup>135</sup> F M Sabatini and others, ‘Protection gaps and restoration opportunities for primary forests in Europe’ (2020) 26 *Diversity and Distributions* 1646, 1656.

<sup>136</sup> Muys and others (n 1) 5.

<sup>137</sup> Commission and others, *Mapping and assessment of primary and old-growth forests in Europe* (Publications Office of the European Union 2021) 22.

Some of the Natura 2000 sites in the EU do include primary and old-growth forests despite their lack of inclusion in the Habitats Directive.<sup>138</sup> However, this may not be enough to achieve the strict protection target as Article 6 of the Habitats Directive does not enable strict protection by its nature. The strict protection target of the EU Biodiversity Strategy 2030 has been explained to mean that the natural processes of the area are left undisturbed.<sup>139</sup> Currently, ‘not all management plans of Natura 2000 sites might recognise the explicit value of primary and old-growth forests’.<sup>140</sup> Member States are obliged to establish these management plans under Article 6(1) of the Habitats Directive. However, the management of Natura 2000 forests does not solely need to focus on nature protection, but different activities, such as timber production can be included.<sup>141</sup> For primary and old-growth forests this can be detrimental.<sup>142</sup>

If the conservation measures and management plans under Article 6(1) of the Habitats Directive do not identify the value of primary and old-growth forests as stated above, strict protection may be threatened. This in turn threatens the achievement of commitment in the EU Biodiversity Strategy 2030 to strictly protect all remaining primary and old-growth forests.<sup>143</sup> Without the explicit inclusion of primary and old-growth forests under the protection of the Habitats Directive, their protection remains largely at the discretion of the Member States. The Annex-based system and Article 3(2) of the Habitats Directive therefore create a weakness by restricting what is protected under the Directive. The two limit the forest biodiversity protection provided by the current EU legal system as a part of valuable biodiversity is left out.

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<sup>138</sup> *ibid*, 18.

<sup>139</sup> EU Biodiversity Strategy 2030 (n 20), 4.

<sup>140</sup> Commission and others, *Mapping and assessment of primary and old-growth forests in Europe* (Publications Office of the European Union 2021) 18.

<sup>141</sup> Commission, *Natura 2000 and Forests Part I-II* (Office for Official Publications of the European Communities 2015) 58.

<sup>142</sup> Watson and others (n 8) 605.

<sup>143</sup> EU Biodiversity Strategy 2030 (n 20) 5.

### 3.3 No target deadlines for objectives, no incentive to achieve

The final weakness of the current EU legal system identified here is that the Habitats Directive does not define deadlines for its objectives. For example, there are no deadlines for the maintenance and restoration of the favourable conservation status of habitat types.<sup>144</sup> This is an objective under Article 2(2) of the Habitats Directive. The Natura 2000 sites are considered to be the essence for the achievement of a favourable conservation status in the EU.<sup>145</sup> The ECJ has held that the favourable conservation status is to be assessed on the Union level in the context of designating Natura 2000 sites.<sup>146</sup> Out of the total forest area covered by the Habitats Directive, ‘only 14.1% of forest habitats are in a favourable conservation status’.<sup>147</sup> The low percentage indicates that something is amiss.

Hoek has argued that with the absence of deadlines in the Habitats Directive, ‘Member States have little incentive to invest in restoration policies which go beyond maintaining the status quo’.<sup>148</sup> This can therefore threaten forest biodiversity if there is little incentive to achieve the objectives. Furthermore, the achievement of the EU targets on biodiversity does not seem foreseeable without a legal roadmap. Although the EU has set out the Biodiversity Strategies for 2020 and 2030 with targets to be achieved by the end year of the strategies, they have not replaced the lack of deadlines in the Habitats Directive. For 2020, the EU Biodiversity Strategy set out a target on halting ‘the deterioration in the status of all species and habitats covered by EU nature legislation’ as well as on improving their status.<sup>149</sup> This target was not met.<sup>150</sup> Trying to continue the process, the EU Biodiversity Strategy 2030 again sets the target

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<sup>144</sup> Kokko (n 87) 51. The conservation status of natural habitat types and the favourable conservation status are defined in Article 1(e) of the Habitats Directive.

<sup>145</sup> Commission, *Natura 2000 and Forests Part I-II* (Office for Official Publications of the European Communities 2015) 59.

<sup>146</sup> Case C-371/98 *The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd (First Corporate Shipping)* [2000] ECR I-09235, para 23.

<sup>147</sup> J Maes and others, *Mapping and Assessment of Ecosystems and their Services: An EU ecosystem assessment* (Publications Office of the European Union 2020) 10.

<sup>148</sup> Hoek (n 123) 322.

<sup>149</sup> EU Biodiversity Strategy 2020 (n 134) 5.

<sup>150</sup> Commission, ‘Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee: The state of nature in the European Union, Report on the status and trends in 2013 – 2018 of species and habitat types protected by the Birds and Habitats Directives’ COM (2020) 635 final, 9.

of ‘no deterioration in conservation trends and status of all protected habitats and species by 2030’.<sup>151</sup>

In the *Białowieża* case, the ECJ stated that the objectives and procedures of Article 6 of the Habitats Directive are designed to achieve the objectives of Article 2(2) of the Directive.<sup>152</sup> Whether Article 6 is enough to achieve the objectives and mitigate the weakness of the absence of deadlines can be questioned. As explained in Chapter 2, under Article 6(1) and (2) of the Habitats Directive, the Member States are obliged to establish conservation measures for the SACs and to avoid deterioration of the habitats. Moreover, Article 6(3) of the Habitats Directive mentions ‘the site’s conservation objectives’ in the context of an appropriate assessment. Stahl has suggested that due to the Habitats Directive not defining what these conservation objectives are, they can be read in light of the Directive’s general objectives from Article 2.<sup>153</sup> This implies that the conservation objectives are to apply the Directive’s objectives on a site level and implement these through the conservation measures.<sup>154</sup> The measures taken under Article 6 could therefore aid in the achievement of the Directive’s objectives. However, the evidence on the low percentage of forests with a favourable conservation status does not indicate that Article 6 of the Habitats Directive alone is enough. Considering these shortfalls, the weakness of the absence of target deadlines in the Habitats Directive remains.

With the lack of target deadlines in the Habitats Directive, there is no timeline within the Directive for the achievement of its objectives. Member States are to report to the Commission every six years on how they have implemented measures.<sup>155</sup> This report is to include information on Article 6(1) conservation measures, and on how those measures have impacted the conservation status of Annex I natural habitats.<sup>156</sup> The Commission will compose the Member States’ reports into one.<sup>157</sup> However, there are no provisions for

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<sup>151</sup> EU Biodiversity Strategy 2030 (n 20) 6.

<sup>152</sup> *Białowieża* (n 70) para 106.

<sup>153</sup> Lucile Stahl, ‘The concept of ‘conservation objectives’ in the Habitats Directive: a need for a better definition’ in Charles-Hubert Born and others (eds), *The Habitats Directive in its EU Environmental Law Context: European Nature’s Best Hope?* (Routledge 2015) 58.

<sup>154</sup> *ibid* 59.

<sup>155</sup> The Habitats Directive (n 24) Art 17(1).

<sup>156</sup> *ibid*.

<sup>157</sup> *ibid*, Art 17(2).

accountability if the objectives are not met. Therefore, the absence of deadlines in the Habitats Directive leads to multiple issues. The achievement of the objectives is endangered without an incentive for the Member States, and the current obligations do not guarantee the achievement of the objectives. Without accountability provisions, the trust is put on the Member States to achieve the objectives.

### **3.4 Conclusions on the weaknesses**

To answer the second research question, three weaknesses of the current EU legal system were identified. Firstly, there is a lack of direct obligations to protect and restore forests outside the Natura 2000 network in the Habitats Directive. This questions the achievement of the goals set out in the EU Biodiversity Strategy 2030 and the EU's international commitments. Secondly, the Annex-based system and Article 3(2) of the Habitats Directive create limitations on what is covered by the Directive's protection. Finally, the absence of deadlines for the achievement of the Habitats Directive's objectives is another weakness in the current EU legal system. The next Chapter will describe and analyse the Nature Restoration Regulation.

## 4 The Nature Restoration Regulation

In this Chapter, the Nature Restoration Regulation will be introduced and described. The second part of the Chapter will discuss how the Nature Restoration Regulation would impact the current protection of forest biodiversity in the EU. To answer the third research question, the Regulation's response to the weaknesses of the current EU legislation from the previous Chapter is analysed.

### 4.1 Introducing the Nature Restoration Regulation

#### 4.1.1 Purpose of the Nature Restoration Regulation

Internationally, the need for restoration of ecosystems had previously been identified in the Strategic Goals and the Aichi Biodiversity Targets of the Convention on Biological Diversity for 2020.<sup>158</sup> Restoration gained further focus on an international scale by the United Nations General Assembly declaring a decade on ecosystem restoration from 2021 to 2030.<sup>159</sup> On the EU level, the EU Biodiversity Strategy 2030 set out that Europe would lead the way in reversing biodiversity loss with an EU Nature Restoration Plan.<sup>160</sup> The Strategy recognised gaps in the implementation and regulation of already existing requirements on nature restoration in the EU legislation.<sup>161</sup>

The EU Biodiversity Strategy 2030 thus committed to propose EU nature restoration targets which would be legally binding.<sup>162</sup> The proposal on the Nature Restoration Regulation is the result.<sup>163</sup> The legal basis of the Nature Restoration Regulation is Article 192(1) of the TFEU.<sup>164</sup> Therefore it is aimed to meet the Union's objectives on the environment under

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<sup>158</sup> COP CBD, 'Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its tenth meeting. X/2. The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets' Conference of the Parties to the Convention on Biological Diversity, 29 October 2010 UNEP/CBD/COP/DEC/X/2, Strategic goal D, Targets 14, 15.

<sup>159</sup> United Nations General Assembly, 'Resolution adopted by the General Assembly on 1 March 2019. United Nations Decade on Ecosystem Restoration (2021-2030)' United Nations General Assembly, 6 March 2019 A/RES/73/284.

<sup>160</sup> EU Biodiversity Strategy 2030 (n 20) 6.

<sup>161</sup> *ibid.*

<sup>162</sup> *ibid.*, 14.

<sup>163</sup> Commission (2022) (n 28) Explanatory Memorandum, 2-3.

<sup>164</sup> Nature Restoration Regulation 2024 (n 29) preamble.



Article 191 of the TFEU.<sup>165</sup> The purpose of the Regulation is to ‘contribute to: the long-term and sustained recovery of biodiverse and resilient ecosystems across the Member States’ land and sea areas’.<sup>166</sup> Furthermore, the rules are contributing to the achievement of the EU’s international commitments.<sup>167</sup> In the preamble of the Regulation these commitments are explained as the Kunming-Montreal Global Biodiversity Framework under the Convention on Biological Diversity and the UN Sustainable Development Goals.<sup>168</sup> The next sections will describe and discuss how the Nature Restoration Regulation would oblige the Member States to achieve its purpose through the different provisions.

#### **4.1.2 General obligations**

The Nature Restoration Regulation is concerned with ‘the restoration of degraded ecosystems’.<sup>169</sup> With the biodiversity in forests degrading as explained in the background of this thesis, the Regulation is relevant for forests. The relevant geographical scope of the Regulation is ‘the territory of Member States’.<sup>170</sup> Specifically, the ‘Regulation applies only to ecosystems in the European territory of the Member States’.<sup>171</sup> The Regulation sets in Article 1(2) a joint Union target to cover ‘at least 20% of land areas and at least 20% of sea areas by 2030, and all ecosystems in need of restoration by 2050’.

Article 4 of the Regulation sets out the general obligations for the restoration of terrestrial, coastal, and freshwater ecosystems. The first subsection of Article 4 sets out the obligation of necessary restoration measures for the improvement of Annex I habitat types not in good condition.<sup>172</sup> By 2030, restoration measures are to be put in place ‘on at least 30% of the total area of all habitat types listed in Annex I that is not in good condition’.<sup>173</sup> Annex I of the Nature Restoration Regulation is the same list of habitat types as in Annex I of the Habitats

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<sup>165</sup> TFEU (n 43) Art 192(1).

<sup>166</sup> Nature Restoration Regulation 2024 (n 29) Art 1(1)(a).

<sup>167</sup> *ibid*, Art 1(1)(d).

<sup>168</sup> *ibid*, preamble 4, 5.

<sup>169</sup> *ibid*, Art 1(1)(a).

<sup>170</sup> *ibid*, Art 2(a).

<sup>171</sup> *ibid*, Art 2.

<sup>172</sup> *ibid*, Art 4(1).

<sup>173</sup> *ibid*, Art 4(1)(a).

Directive.<sup>174</sup> Notably in Article 4(1), the priority is given to areas within Natura 2000 sites until 2030.<sup>175</sup> The provision can be interpreted as implying that after 2030 the restoration measures shall be put in place inside and outside the Natura 2000 sites.<sup>176</sup> There is a possibility of derogating from the obligations of Article 4(1).<sup>177</sup> This derogation however does not exclude the Member State from the obligation to put in place restoration measures.<sup>178</sup> Rather, the derogation allows the Member State to ‘exclude from the relevant group of habitat types very common and widespread habitat types that cover more than 3% of their European territory’.<sup>179</sup> Where this is applied, the Member States are still required to take restoration measures although on a lower scale in comparison to Article 4(1).<sup>180</sup>

Under Article 4(4), the Member States are subject to an obligation to establish necessary restoration measures ‘to re-establish the habitat types listed in Annex I in areas where those habitat types do not occur’.<sup>181</sup> These measures have ‘the aim of reaching the favourable reference area for those habitat types’.<sup>182</sup> The favourable reference area is measured at the national level, meaning the total area of a habitat type, ‘considered the minimum necessary to ensure the long-term viability of the habitat type’, its typical species or species composition, and the habitat type’s ecological variations.<sup>183</sup> For Annex I habitat types, this re-establishment is contributing to their favourable conservation status.<sup>184</sup> The provision formulates targets for the re-establishment for the years 2030, 2040, and 2050.<sup>185</sup>

Another Member State obligation is set out in Article 4(11) of the Nature Restoration Regulation. The measures by the Member States should aim that the restoration areas under Article 4(1) and (4) ‘show a continuous improvement in the condition of the habitat types

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<sup>174</sup> *ibid*, Annex I.

<sup>175</sup> *ibid*, Art 4(1).

<sup>176</sup> *ibid*.

<sup>177</sup> *ibid*, Art 4(2).

<sup>178</sup> *ibid*.

<sup>179</sup> *ibid*.

<sup>180</sup> *ibid*.

<sup>181</sup> *ibid*, Art 4(4).

<sup>182</sup> *ibid*.

<sup>183</sup> *ibid*, Art 3(8).

<sup>184</sup> *ibid*.

<sup>185</sup> *ibid*, Art 4(4).

listed in Annex I until good condition is reached'.<sup>186</sup> Under Article 4(17), the Member States shall ensure that the area of Annex I habitat types in good condition increases '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'.<sup>187</sup> For habitats of species under the Habitats Directive and the Birds Directive, 'an increasing trend towards the sufficient quality and quantity' is enough.<sup>188</sup>

The EU Member States are to fulfil the obligations of the Nature Restoration Regulation and to contribute to the objectives and targets of Article 1 through national restoration plans.<sup>189</sup> National restoration plans are covered in Chapter 3 of the Regulation. These plans are to be prepared for the identification of the necessary restoration measures needed to achieve the obligations, objectives and targets of the Regulation.<sup>190</sup> The content of the plans is to cover the period until 2050.<sup>191</sup> Thus the timeline follows the international goals and the EU's commitments.<sup>192</sup> Additionally, the plans are to include 'intermediate deadlines corresponding to the targets and obligations set out in Articles 4 to 13'.<sup>193</sup> With the preparation of the plans, the Member States are to take into account 'the conservation measures established for Natura 2000 sites in accordance with' the Habitats Directive.<sup>194</sup>

The national restoration plans are to be reviewed and revised every ten years starting from 2032.<sup>195</sup> Member States need to include supplementary measures if the plan is not sufficient for the targets and obligations of the Regulation.<sup>196</sup> Furthermore, the Member States are under an obligation to report specific data and information to the Commission on the progress and measures.<sup>197</sup> Based on the reported information, if the Commission considers that the Member

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<sup>186</sup> *ibid*, Art 4(11). According to the provision, the same aim of continuous improvement should be for restoration areas under Article 4(7) which concerns the habitats of species.

<sup>187</sup> *ibid*, Art 4(17)(a).

<sup>188</sup> *ibid*, Art 4(17)(b).

<sup>189</sup> *ibid*, Art 14(1).

<sup>190</sup> *ibid*.

<sup>191</sup> *ibid*, Art 15(1).

<sup>192</sup> Kunming-Montreal Global Biodiversity Framework (n 11) Annex; EU Biodiversity Strategy 2030 (n 20).

<sup>193</sup> Nature Restoration Regulation 2024 (n 29) Art 15(1).

<sup>194</sup> *ibid*, Art 14(14)(a).

<sup>195</sup> *ibid*, Art 19(1).

<sup>196</sup> *ibid*, Art 19(2).

<sup>197</sup> *ibid*, Art 21.

State is making insufficient progress, it can request ‘a revised draft national restoration plan with supplementary measures’ after consulting the Member State in question.<sup>198</sup> These supplementary measures are the only method of accountability in the Nature Restoration Regulation if a Member State is not on track towards the targets or fulfilling its obligations.

### **4.1.3 Non-deterioration**

In the 2022 Commission’s proposal for the Nature Restoration Regulation, Article 4(7) set out a non-deterioration clause by obliging the Member States to ‘ensure that areas where habitat types listed in Annex I occur do not deteriorate’.<sup>199</sup> The European Parliament omitted this provision from its 2023 version.<sup>200</sup> However, in the 2024 version, the non-deterioration clause was introduced again, although as a weaker version in comparison to the original.<sup>201</sup> Article 4(12) of the Nature Restoration Regulation establishes the Member States’ obligation to ‘endeavour to put in place necessary measures with the aim of preventing significant deterioration of areas where the habitat types listed in Annex I to this Regulation occur and which are in good condition or are necessary to meet the restoration targets’ of Article 4(17).<sup>202</sup>

In comparison to the proposal’s 2022 version, the wording of Article 4(12) has been significantly weakened with the change from ‘shall ensure’ to ‘shall endeavour’ and with the addition of ‘significant’ to deterioration.<sup>203</sup> The new wording seems to indicate that the obligation to prevent deterioration can be fulfilled with an attempt to have measures rather than with an actual implementation of measures to prevent significant deterioration. Nevertheless, including the provision in the Regulation is an improvement to its omission in the 2023 version. A deadline for the measures preventing deterioration is the date of the national restoration plan’s publication.<sup>204</sup> This publication date is six months after the

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<sup>198</sup> *ibid*, Art 19(3).

<sup>199</sup> Commission (2022) (n 28) Art 4(7).

<sup>200</sup> European Parliament (2023) (n 29) Art 4.

<sup>201</sup> Nature Restoration Regulation 2024 (n 29) Art 4(12).

<sup>202</sup> *ibid*, Art 4(12).

<sup>203</sup> Commission (2022) (n 28), Art 4(7); Nature Restoration Regulation 2024 (n 29) Art 4(12).

<sup>204</sup> Nature Restoration Regulation 2024 (n 29) Art 4(12).

Member State has received the Commission's observations on the plan.<sup>205</sup> Before these observations, the Member States are to submit a draft national restoration plan to the Commission by the deadline of 'the first day of the month following 24 months from the date of entry into force' of the Nature Restoration Regulation.<sup>206</sup>

Another non-deterioration clause in the Nature Restoration Regulation can be found in Article 4(11). Article 4(11) sets out the non-deterioration clause concerning 'areas in which good condition has been reached, and in which the sufficient quality of the habitats of the species has been reached'.<sup>207</sup> For these areas, the Member States 'shall aim to ensure' that no significant deterioration occurs.<sup>208</sup> This part of the provision needs to be read with the first part of Article 4(11), which sets out the aim for a continuous improvement in the Annex I habitat types' condition, to understand that the areas concerned include Annex I habitat types.<sup>209</sup> The inclusion of the word 'aim' with 'shall' in the deterioration part of Article 4(11) weakens the meaning of the obligation significantly in comparison to the original 2022 wording 'shall ensure'.<sup>210</sup> Yet, the 2023 version of the provision was even weaker.<sup>211</sup> In the 2023 amendments the wording was changed from the 2022 'do not deteriorate' to 'does not significantly decrease over time'.<sup>212</sup>

The obligations of Article 4(11) and (12) of the Nature Restoration Regulation can be derogated from both inside and outside Natura 2000 sites, in the cases of force majeure or where climate change has directly caused unavoidable habitat transformations.<sup>213</sup> Outside Natura 2000 sites they do not apply either if there is an overriding public interest plan or project with no other solutions which would be less damaging.<sup>214</sup> For Article 4(11), outside the Natura 2000 sites, the derogation based on a plan or project is determined case by case.<sup>215</sup>

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<sup>205</sup> *ibid*, Art 17(6).

<sup>206</sup> *ibid*, Art 16.

<sup>207</sup> *ibid*, Art 4(11).

<sup>208</sup> *ibid*, Art 4(11).

<sup>209</sup> *ibid*.

<sup>210</sup> Commission (2022) (n 28) Art 4(6); Nature Restoration Regulation 2024 (n 29) Art 4(11).

<sup>211</sup> European Parliament (2023) (n 29) Art 4(6).

<sup>212</sup> Commission (2022) (n 28) Art 4(6); *ibid*.

<sup>213</sup> Nature Restoration Regulation 2024 (n 29) Art 4(14), (15).

<sup>214</sup> *ibid*, Art 4(14)(c), (15)(c). A further derogation scenario according to Articles 4(14)(d) and 4(15)(d) is 'action or inaction by third countries for which the Member State concerned is not responsible'.

<sup>215</sup> *ibid*, Art 4(14)(c).

Furthermore, Article 6(4) of the Habitats Directive can be used as a derogation within Natura 2000 sites as well.<sup>216</sup> This shows the interlink of the regimes where they ‘supplement each other’.<sup>217</sup>

The deterioration provisions of the Nature Restoration Regulation are thus weaker than in the 2022 version of the Commission’s proposal.<sup>218</sup> Nevertheless, both subsections 11 and 12 are ‘[w]ithout prejudice to’ the Habitats Directive.<sup>219</sup> As described in Chapter 2, in the Habitats Directive, Article 6(2) sets out a non-deterioration clause. Importantly, Article 6(2) of the Habitats Directive does not limit the avoidance of deterioration to necessary or good condition areas but applies to all special areas of conservation.<sup>220</sup> Therefore, even though the non-deterioration provisions of the Nature Restoration Regulation are not strong, where restoration measures are taken on Natura 2000 sites, the Member States are still bound by the non-deterioration obligation of the Habitats Directive. With its deterioration provisions, the Nature Restoration Regulation adds value to the current legislation by extending the provision outside the Natura 2000 network. Where Article 6(2) of the Habitats Directive only applies to the special areas of conservation, Article 4(11) and (12) of the Nature Restoration Regulation apply to a wider scope especially when restoration measures are taken outside the Natura 2000 network. Therefore, this could protect forest biodiversity from significant deterioration in a larger area.

#### **4.1.4 Forests and restoration**

Articles 12 and 13 of the Nature Restoration Regulation concern specifically forests. While there is a definition of ‘ecosystem’ in Article 3(1) of the Regulation, there is no definition for ‘forest ecosystem’. Article 12 focuses on the restoration of forest ecosystems while Article 13 sets out the Union’s ‘commitment of planting at least three billion additional trees by 2030’.<sup>221</sup> The same objective is a key commitment in the EU Biodiversity Strategy 2030.<sup>222</sup> The EU

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<sup>216</sup> Nature Restoration Regulation 2024 (n 29) Art 4(16)(c).

<sup>217</sup> Hoek (n 123) 326.

<sup>218</sup> See Commission (2022) (n 28) Art 4(7).

<sup>219</sup> Nature Restoration Regulation 2024 (n 29) Art 4(11), (12).

<sup>220</sup> The Habitats Directive (n 24) Art 6(2).

<sup>221</sup> Nature Restoration Regulation 2024 (n 29) Arts 12, 13(1).

<sup>222</sup> EU Biodiversity Strategy 2030 (n 20) 14.

Forest Strategy 2030 further sets out an implementation roadmap to achieve this goal by creating ‘criteria for tree planting, counting and monitoring’.<sup>223</sup> Additional background to Article 13 is another objective of the EU Biodiversity Strategy 2030. The Strategy calls to ‘increase the quantity, quality and resilience’ of the EU forests in order to fight the threats forests are facing.<sup>224</sup> The Commission itself has however noted that ‘[p]lanting new trees is not an alternative to preserving existing trees’.<sup>225</sup> Other measures for the protection of forest biodiversity are thus needed.

Concerning the restoration of forest ecosystems, Article 12(1) of the Nature Restoration Regulation sets out an obligation for Member States to take restoration measures for the enhancement of forest ecosystem biodiversity. Article 12(2) of the Regulation obliges the Member States to ‘achieve an increasing trend at national level of the common forest bird index’. Furthering the obligations, Article 12(3) lists seven forest ecosystem indicators, out of which the Member States are to achieve an increasing trend at the national level for six indicators. These indicators are such as standing deadwood, lying deadwood, the share of forests with uneven-aged structure, and forest connectivity.<sup>226</sup> The 2023 version of Article 12 of the Regulation was criticised for not aiming for the achievement of the natural state of forest ecosystems but for the increase of the common forest bird index as well as for the enhancement of natural characteristics and carbon stock.<sup>227</sup> The 2023 version did not include standing and lying deadwood as a forest ecosystem indicator.<sup>228</sup> This would have been a weakness as in order to have for example biodiversity-friendly forestry practices, both ‘the conservation and restoration of near-natural forests’ and ‘deadwood should always be part of the management plan’.<sup>229</sup> Having deadwood as an indicator in legislation may thus ensure that even if forestry is exercised in the restoration areas, forest biodiversity is better taken into account.

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<sup>223</sup> EU Forest Strategy 2030 (n 34) 15.

<sup>224</sup> EU Biodiversity Strategy 2030 (n 20) 9.

<sup>225</sup> Commission, ‘Commission Staff Working Document: The 3 Billion Tree Planting Pledge For 2030, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: New EU Forest Strategy for 2030’ SWD (2021) 651 final, 3.

<sup>226</sup> Nature Restoration Regulation 2024 (n 29) Art 12(3)(a)-(d).

<sup>227</sup> Pappila and Soininen (n 9) 31.

<sup>228</sup> European Parliament (2023) (n 29) Art 10(2a).

<sup>229</sup> Muys and others (n 1) 39.

Although the inclusion of deadwood as an indicator may not completely remedy the criticism of the lack of aim for a natural state, the list of forest ecosystem indicators in Article 12(3) addresses some of the threats forests and forest biodiversity face. To illustrate this, ‘missing deadwood and missing continuity of deadwood and senescent trees [and] the creation of even-aged stand structure’ are considered as threats to forest habitats.<sup>230</sup> Consequently, standing and lying deadwood, and the ‘share of forests with uneven-aged structure’ are listed in Article 12(3).<sup>231</sup> As mentioned earlier, the Article obliges Member States to ‘achieve an increasing trend at national level of at least six out of seven’ of the listed forest ecosystem indicators.<sup>232</sup> The choice of indicators is to be based on how the indicator can ‘demonstrate the enhancement of biodiversity of forest ecosystems within the Member State concerned’.<sup>233</sup> Therefore, while the natural state of the forest ecosystem may not be the objective of the Article, there seems to be an attempt to increase biodiversity in forests.

In comparison to Article 4, Article 12 does not set out an overriding public interest plan or project as a justification for non-fulfilling the obligations.<sup>234</sup> The only justifications are a force majeure of large-scale, or unavoidable habitat transformations with direct causation by climate change.<sup>235</sup> Furthermore, the restoration measures under Article 12(1) are not only applicable to the forest habitat types of Annex I as the provision states that the measures for the enhancement of biodiversity in forest ecosystems are to be established ‘in addition to the areas’ subject to Article 4(1), (4) and (7).<sup>236</sup> Due to this, ‘the nature restoration laws are expanded beyond the Annexes of the existing’ Nature Directives.<sup>237</sup> This therefore should widen the scope of the area where forest biodiversity is covered by the EU legal system. The next section will analyse how the Nature Restoration Regulation addresses the weaknesses of the current EU legislation.

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<sup>230</sup> J A M Janssen and others, *European Red List of Habitats. Part 2. Terrestrial and freshwater habitats* (Publications Office of the European Union 2016) 21.

<sup>231</sup> Nature Restoration Regulation 2024 (n 29) Art 12(3)(a), (b), (c).

<sup>232</sup> *ibid*, Art 12(3).

<sup>233</sup> *ibid*, Art 12(3).

<sup>234</sup> *ibid*, Arts 4(14), (15), (16), 12(4).

<sup>235</sup> *ibid*, Art 12(4).

<sup>236</sup> *ibid*, Art 12(1).

<sup>237</sup> Hoek (n 123) 326.



## **4.2 Change in comparison to the current legal system**

Restoration of habitats is not a new concept introduced by the Nature Restoration Regulation as already in Article 2(2) of the Habitats Directive restoring natural habitats among others is mentioned as an objective.<sup>238</sup> Nevertheless, the Nature Restoration Regulation would take a new, wider approach with its focus on restoration in comparison to the Habitats Directive. This section will now explore the third research question by analysing the Nature Restoration Regulation in comparison to the weaknesses of the current EU legislation protecting forest biodiversity which were identified in Chapter 3.

### **4.2.1 Measures outside Natura 2000 are left to the Member States' discretion**

The first weakness of the current EU legal system is the lack of direct obligations to protect and restore forests outside the Natura 2000 network in the Habitats Directive and thus the lack of forest protection outside Natura 2000 sites. This section looks at the approach the Nature Restoration Regulation would take to measures outside the Natura 2000 network in comparison to the Habitats Directive.

The preamble of the Nature Restoration Regulation sets out a need for restoration measures also in the areas not covered by the Habitats Directive.<sup>239</sup> This indicates that the legislators have had an intent to address the need for improving forest biodiversity outside the Natura 2000 network. However, the general obligations of the Nature Restoration Regulation put the focus of the first measures on the Natura 2000 network. As previously mentioned, Article 4(1) of the Nature Restoration Regulation gives priority to the Natura 2000 sites until 2030. In light of this priority, it may not be expected that the Member States undertake the general obligations of Article 4(1) on restoration measures outside of the Natura 2000 network before 2030. Nevertheless, beyond 2030 without the priority on the Natura 2000 sites, Article 4(1) can be interpreted to oblige the Member States to expand the restoration measures beyond the protected areas of the Natura 2000 network to achieve the targets set by the Article.

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<sup>238</sup> The Habitats Directive (n 24) Art 2(2).

<sup>239</sup> Nature Restoration Regulation 2024 (n 29) preamble 62.

Another possibility for measures outside the Natura 2000 network is Article 4(4) of the Nature Restoration Regulation which concerns the re-establishment of the Annex I habitat types in areas where they are not present. The Commission has stated that restored areas could contribute towards the EU's targets on protected areas.<sup>240</sup> Therefore, there could be an opportunity through successful re-establishment to increase the protected areas either within the Natura 2000 network or outside it. If successful re-establishment of Annex I habitat types in an area where they do not occur would increase the habitat types in need of protection either outside the Natura 2000 network or in connection to it, there could be an opportunity to increase protected areas. If a re-established area would be added to the network or protected as another area for example through a national scheme, this could lead to wider coverage and therefore increase the enhancement of forest biodiversity.

Significantly to Articles 4(1) and 4(4) of the Regulation, Article 4(10) establishes that 'the need for improved connectivity between the habitat types listed in Annex I' shall be considered in the restoration measures under these two paragraphs. This resembles the Habitats Directive's Articles 3(3) and 10 with an encouragement to look outside the covered areas. Similarly to the Articles in the Habitats Directive, the wording of Article 4(10) with 'shall consider' does not create a strong obligation for the Member States to take measures outside the areas covered by the Annex I habitats. There is no obligation to establish connectivity.<sup>241</sup> Nevertheless, this provision addresses the weakness of the Habitats Directive significantly, 'as the provision is formulated as a binding requirement' and therefore while the Member States are not obliged to establish connectivity, the need for it must be considered.<sup>242</sup> Article 12(3)(d) of the Regulation furthers the obligations outside Natura 2000, as it lists forest connectivity as one of the forest ecosystem indicators. However, achieving the connectivity depends on the Member States whether they choose forest connectivity as an indicator for their forest ecosystems.<sup>243</sup> Although the Nature Restoration Regulation creates

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<sup>240</sup> Commission, 'Commission Staff Working Document: Criteria and guidance for protected areas designation' SWD (2022) 23 final, 10.

<sup>241</sup> Hoek (n 123) 330.

<sup>242</sup> *ibid.*

<sup>243</sup> Nature Restoration Regulation 2024 (n 29) Art 12(3).

an opportunity to look beyond the Natura 2000 network through the connectivity of habitats, it is left to the Member States' discretion to consider this.

The provision addressing the lack of direct obligations outside the Natura 2000 network in the Habitats Directive the most is Article 12(1) of the Nature Restoration Regulation. As the priority on Natura 2000 sites in Article 4(1) of the Regulation is only applicable to the measures under Article 4(1), Article 12(1) of the Nature Restoration Regulation focuses on a wider area. Article 12(1) of the Regulation establishes that ‘Member States shall put in place the restoration measures [...] in addition to the areas that are subject to restoration measures pursuant to Article 4(1), (4) and (7)’. Especially as Article 4(1) prioritises Natura 2000 sites until 2030, the measures under Article 12(1) expand the covered area. With Article 4(4) of the Nature Restoration Regulation focusing on the re-establishment of Annex I habitats and Article 4(7) on the habitats of species from Annexes II, IV and V of the Habitats Directive, the coverage of Article 12(1) could prove to be significant. Article 12(1) indicates a move away from the Natura 2000 sites of the Habitats Directive as well as from the Annex-based system, which will be discussed next.

#### **4.2.2 A mixed approach to the Annex-based system**

The second weakness of the current EU legal system discussed in Chapter 3 is the Annex-based system of the Habitats Directive, which creates limitations together with Article 3(2) of the Directive on what is covered under the protection of the Habitats Directive. The Nature Restoration Regulation takes a mixed approach to this Annex-based system.

The Nature Restoration Regulation follows the Annex I of the Habitats Directive.<sup>244</sup> The targets of Articles 4(1) and 4(4) concern the habitat types of Annex I.<sup>245</sup> Thus, the Annex-based system of the Habitats Directive lingers on in the general obligations of the Nature Restoration Regulation. As there are no amendments to the Annex, the list of habitat types in

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<sup>244</sup> *ibid*, Annex I.

<sup>245</sup> *ibid*, Art 4(1), (4).

the Annex does not address the limitations and the weaknesses of what is covered by the Annex-based system.

As with Article 3(2) of the Habitats Directive, which limits the protection measures under the Directive only to a proportion of Annex I habitat types in the Member States' territory, the restoration measures of Article 4(1) of the Nature Restoration Regulation also concern only a proportion of Annex I habitats. The measures are to be taken on areas where the habitat types are not in good condition and additionally only on a percentage of these areas.<sup>246</sup> For example, by 2030 the percentage is to be 'at least 30% of the total area of all habitat types listed in Annex I that is not in good condition'.<sup>247</sup> By 2040 the area is to be at least 60% and by 2050 at least 90%.<sup>248</sup> Thus, these targets continue to cover only a proportion of the habitat types.

In the Habitats Directive, a consequence of the Annex-based system is that it does not explicitly include primary and old-growth forests in the protection. Again, for this weakness, Article 12 of the Nature Restoration Regulation gives relief by moving away from the Annex-based system. The Article applies 'in addition to the areas' subject to Article 4(1), (4), and (7) measures, therefore meaning in addition to forest habitats listed in Annex I.<sup>249</sup> This would allow for an opportunity to include primary and old-growth forests in the restoration measures under Article 12. Yet, the opportunity to include these forests is left to the Member States' discretion through the choice of what they consider as necessary measures to meet the Article 12 obligations within their national restoration plans under Article 14 of the Regulation.

The only explicit mentions of old-growth forests in the Nature Restoration Regulation are in the preamble and Annex VII of the Regulation. The preamble only mentions primary and old-growth forests in the context of the commitments under the EU Biodiversity Strategy 2030.<sup>250</sup> The mention in the Annex is related to the national restoration plans.<sup>251</sup> As was explained earlier, Member States need to prepare a national restoration plan for the restoration targets

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<sup>246</sup> *ibid*, Art 4(1).

<sup>247</sup> *ibid*, Art 4(1)(a).

<sup>248</sup> *ibid*, Art 4(1)(b).

<sup>249</sup> *ibid*, Art 12(1).

<sup>250</sup> *ibid*, preamble 10.

<sup>251</sup> *ibid*, Art 14(16), Annex VII.

and obligations of the Regulation.<sup>252</sup> During the preparation of their national restoration plans, Member States can use ‘the different examples of restoration measures listed in Annex VII’.<sup>253</sup> Section 15 of Annex VII of the Regulation lists enhancing the development of old-growth forests as an example of restoration measures that can be considered under Article 14(16). This could be done for example by abandoning harvesting or enhancing the forests through active management.<sup>254</sup> The use of these measures is left largely to Member State discretion, as Article 14(16)(a) states that Member States ‘may make use’ of the Annex VII examples. This wording does not make the examples given in Annex VII mandatory. Therefore, the Nature Restoration Regulation does not provide explicit measures for primary and old-growth forests either. Thus, this is a continuing weakness, as there is a need to also restore primary and old-growth forests.<sup>255</sup>

In conclusion, while the Annex-based system of the Habitats Directive remains in the Nature Restoration Regulation, Article 12 of the Regulation does move away from the system. However, the possibility to include measures for primary and old-growth forests, which the Annex-based system leaves out, is left at the discretion of Member States. The next section will analyse how the Nature Restoration Regulation addresses the final identified weakness of the current EU legislation.

### **4.2.3 Deadlines for the objectives**

As was established in Chapter 3, the Habitats Directive does not set deadlines for the achievement of its objectives, such as the maintenance and restoration of the favourable conservation status. When compared to the other weaknesses of the current EU legal system identified in this thesis, the Nature Restoration Regulation addresses this weakness the most. One of the objectives of the Nature Restoration Regulation is to help recover biodiverse ecosystems ‘through the restoration of degraded ecosystems’.<sup>256</sup> Already in Article 1(2), the Union target of covering 20% of the land with restoration measures by 2030 is set out. Article

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<sup>252</sup> *ibid*, Art 14(1).

<sup>253</sup> *ibid*, Art 14(16).

<sup>254</sup> *ibid*, Annex VII s 15.

<sup>255</sup> Watson and others (n 8) 606.

<sup>256</sup> Nature Restoration Regulation 2024 (n 29) Art 1(1)(a).

4 takes the setting of deadlines further by including the years 2040 and 2050 as target years in addition to 2030. In comparison to the Habitats Directive, there are clear timelines and targets in the Regulation for its objectives.

Additionally, the inclusion of the national restoration plans strengthens these targets and deadlines. The plans need to include intermediate deadlines which correspond to the deadlines of the targets and obligations of the Regulation.<sup>257</sup> The Commission has the power to consider Member State progress towards the targets and obligations and to request ‘a revised draft national restoration plan with supplementary measures’ from the Member State in case of insufficient progress.<sup>258</sup> Together with these Commission powers and the setting of deadlines, the Nature Restoration Regulation is better placed to achieve its objectives than the Habitats Directive is.

The adoption of deadlines in the Regulation may further create an incentive for Member States to put restoration measures in place, which according to Hoek lacks in the Habitats Directive.<sup>259</sup> Indeed, Hoek has argued that ‘through the adoption of deadlines within the Regulation, a gap within the Habitats Directive has been resolved’.<sup>260</sup> However, the deadlines and targets set out in the Nature Restoration Regulation concern only the years by which the restoration measures are to be taken on a specific area percentage, not on when the good condition is to be reached.<sup>261</sup> Thus a small gap remains in the Nature Restoration Regulation.

Despite the Regulation adding deadlines and thus creating a timeline for the targets, the issue of accountability which is present in the Habitats Directive, remains in the Nature Restoration Regulation. The national restoration plans under the Regulation are to be reviewed by the Member States every ten years after 2032.<sup>262</sup> If monitoring finds that the measures in the national restoration plans are insufficient to meet the targets and fulfil the obligations of the Regulation, Member States are to revise the plan and ‘include supplementary measures’

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<sup>257</sup> *ibid*, Art 15(1).

<sup>258</sup> *ibid*, Art 19(3).

<sup>259</sup> See Ch 3.3.

<sup>260</sup> Hoek (n 123) 328.

<sup>261</sup> Nature Restoration Regulation (n 29) Art 4(1); Bente J de Leeuw and Chris W Backes, ‘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?’ (2024) 21 *Journal for European Environmental & Planning Law* 22, 30.

<sup>262</sup> Nature Restoration Regulation 2024 (n 29) Art 19(1).

where necessary.<sup>263</sup> The Commission can additionally request ‘a revised draft national restoration plan with supplementary measures’ from the Member State, after consultation with the State, if the progress towards the targets and obligations is deemed insufficient by the Commission.<sup>264</sup> The Member States are additionally obliged to monitor for example the condition and quality of the habitat types under restoration and the forest biodiversity indicators of Article 12(2).<sup>265</sup> There are also reporting obligations every three or six years depending on the information.<sup>266</sup> However, there are no infringement proceedings for insufficient progress in the Regulation other than taking supplementary measures. Although the Nature Restoration Regulation establishes deadlines and is therefore in a better position to achieve its targets and objectives, a small gap remains in how the Regulation addresses this weakness of the current legislation.

### **4.3 Addressing weaknesses**

In summary, the proposal on the Nature Restoration Regulation addresses the weaknesses of the current EU legislation protecting forest biodiversity by setting out obligations to restore ecosystems both within and outside the Natura 2000 sites and through the creation of target deadlines. The Regulation sets out an intention in its preamble to increase measures outside the areas covered by the Habitats Directive to enhance forest biodiversity. Even though Article 4(1) of the Regulation prioritises Natura 2000 sites until the year 2030, the restoration measures taken after 2030 should expand beyond the Natura 2000 network. Additionally, other provisions such as Article 4(10) concerning the connectivity between Annex I habitat types and Article 12(1), which expands the restoration measures to forest ecosystems in addition to areas under Article 4, could lead to the expansion beyond the covered areas and outside the Natura 2000 network.

As for the Annex-based system, while Article 12(1) does move away from it, the general obligations of the Regulation under Article 4 refer to the Annexes. With the proportional

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<sup>263</sup> *ibid*, Art 19(2).

<sup>264</sup> *ibid*, Art 19(3).

<sup>265</sup> *ibid*, Art 20(1).

<sup>266</sup> *ibid*, Art 21.

targets, the Nature Restoration Regulation continued to limit the coverage of habitat types under the measures. Including primary and old-growth forests in the restoration measures is left to the Member States' discretion. Finally, setting out target deadlines does address the lack of them in the Habitats Directive. However, these are only deadlines for the measures of area coverage and not for the condition of the areas. The next Chapter will further evaluate the added value of the Nature Restoration Regulation to the current EU legislation.



## 5 Evaluation

To answer the fourth research question, this Chapter will evaluate the Nature Restoration Regulation with the Habitats Directive on how the Regulation would add value to the current EU legislation protecting forest biodiversity. The ways the Regulation would add value are evaluated based on the previous analysis. Thus, the answers to the earlier research questions are essential for the evaluation.

### 5.1 Turning the focus to restoration

Within academics, there seems to be a consensus that restoration is a needed measure to protect biodiversity better in the future.<sup>267</sup> The international and EU commitments also call for restoration.<sup>268</sup> Although the Habitats Directive includes restoration in Article 2(2) as its objective, it has no specific obligations on restoration. The lack of restoration obligations can be seen in practice from a study by the European Commission which found that ‘biodiversity restoration activities were rarely employed by forest managers’.<sup>269</sup> Thus, the obligations of the Nature Restoration Regulation on restoration would be a welcomed addition to the EU legislation if the Regulation enters into force.

Clear obligations on Member States to take restoration measures are present in the Nature Restoration Regulation.<sup>270</sup> As was described in the previous Chapter, the Nature Restoration Regulation sets out general obligations for restoration measures under Article 4 which concern terrestrial, coastal and freshwater ecosystems. The Regulation further includes obligations for restoration measures of specific ecosystems, forests being one of these under Article 12. These obligations correct the Habitat Directive’s weakness of not having specific obligations on restoration. Therefore, the Regulation turns the EU to focus more on the

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<sup>267</sup> See An Cliquet and Kris Decler, ‘Halting and restoring species loss: incorporating the concepts of extinction debt, ecological trap and dark diversity into conservation and restoration law’ (2017) 26 Griffith Law Review 178, 178; Sabatini and others (n 135) 1648; Hoek (n 123) 321.

<sup>268</sup> EU Biodiversity Strategy 2030 (n 20) 14; Kunming-Montreal Global Biodiversity Framework (n 11) Annex.

<sup>269</sup> Commission and Directorate-General for Environment, *Study on Implementing Sustainable Forest Management According to the EU Biodiversity Strategy and the EU Bioeconomy Strategy – Final report* (Publications Office of the European Union 2018) 9.

<sup>270</sup> Nature Restoration Regulation 2024 (n 29) Arts 4, 12.

needed restoration by creating obligations on Member States and thus adding value to the current legal system by helping to protect forest biodiversity through restoration.

## 5.2 Going beyond the protected areas

Merely relying on protected areas to protect and conserve biodiversity is not enough.<sup>271</sup> There is a need for measures also outside these protected areas.<sup>272</sup> This has been a weakness in the Habitats Directive. One way the Habitats Directive protects forest biodiversity is through the conservation measures for special areas of conservation.<sup>273</sup> The weakness arises from the weak obligations to restore and protect habitat types outside the Natura 2000 sites. Articles 3(3) and 10 of the Habitats Directive are vague in setting obligations to manage biodiversity outside the network, and there are no concrete obligations to restore ecosystems. Although the species protection provisions in the Habitats Directive and the Birds Directive provide indirect protection for forests and go beyond the Natura 2000 network, this is not enough.

‘The Habitats Directive has not been able to expand the protected zones in line with the’ commitment of protecting 30% of the EU’s land by 2030.<sup>274</sup> The Natura 2000 sites cover 18.6% of the EU’s land.<sup>275</sup> Even when including other protected areas, 25.7% of the EU land is covered, which falls short of the 30% coverage.<sup>276</sup> However, the Nature Restoration Regulation may not resolve this either as the proposal aims to cover at least 20% of the EU’s land area by 2030.<sup>277</sup> In comparison to the EU’s 2030 commitment to legally protect at least 30% of the land, the 20% coverage falls short.<sup>278</sup> In terms of restoration, the EU Biodiversity Strategy 2030 commits to restoring ‘significant areas of degraded and carbon-rich

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<sup>271</sup> FAO and UNEP (n 3) 108.

<sup>272</sup> *ibid.*

<sup>273</sup> The Habitats Directive (n 24) Art 6(1).

<sup>274</sup> Hoek (n 123) 328.

<sup>275</sup> European Environment Agency, ‘Natura 2000 sites designated under the EU Habitats and Birds Directives’ (EEA, 22 November 2022) <<https://www.eea.europa.eu/en/analysis/indicators/natura-2000-sites-designated-under?activeAccordion=eccb3bcf-bbe9-4978-b5cf-0b136399d9f8>> accessed 29 April 2024.

<sup>276</sup> ‘Coverage & representativity’ (*Biodiversity Information System for Europe*) <<https://biodiversity.europa.eu/europes-biodiversity/protected-areas/coverage-representativity>> accessed 29 April 2024.

<sup>277</sup> Nature Restoration Regulation 2024 (n 29) Art 1(2); Hoek (n 123) 328.

<sup>278</sup> EU Biodiversity Strategy 2030 (n 20) 5.

ecosystems' by 2030.<sup>279</sup> Considering the Regulation's target in view of this commitment, it seems appropriate. However, in the Kunming-Montreal Global Biodiversity Framework, the EU is under the goal of 30% restored ecosystems by 2030.<sup>280</sup> In light of this, the Union target in the Nature Restoration Regulation is not sufficient.

According to the Commission, restored areas can 'contribute towards the EU targets on protected areas' where they 'comply (or are expected to comply once restoration produces its full effect) with the criteria for protected areas'.<sup>281</sup> For special areas of conservation, the criteria for their selection are set out in Annex III of the Habitats Directive.<sup>282</sup> The Nature Restoration Regulation refers to the Commission's statement in its preamble.<sup>283</sup> This is important considering the EU Biodiversity Strategy's commitment to protect 30% by 2030. The commitment does not specify the Natura 2000 network but commits to legally protecting the land.<sup>284</sup> Although Natura 2000 plays a significant part in the commitment, other protected areas 'under national protection schemes' are another way to meet the target.<sup>285</sup> The Nature Restoration Regulation gives priority to measures under Article 4(1) within the Natura 2000 sites until 2030. However, an expansion beyond the Natura 2000 network is present in the Regulation, especially with the targets after 2030 and Article 12.<sup>286</sup> Therefore, even if the Nature Restoration Regulation may not aid the EU in achieving 30% protection by 2030, the Regulation does expand its measures outside the protected areas of the Natura 2000 network.

Despite the priority on the Natura 2000 network lingering on in the Nature Restoration Regulation, the Regulation addresses the weakness of the Habitats Directive. The obligations are extended outside the Natura 2000 network. Whether through the Natura 2000 network or restoration measures resulting in other protected areas, the Habitats Directive and the Nature Restoration Regulation would continue the area-based measures for forest biodiversity protection in the EU. The achievement of the 2030 targets may still fall short, but the

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<sup>279</sup> *ibid* 14.

<sup>280</sup> Kunming-Montreal Global Biodiversity Framework (n 11) Annex, Section H, Target 2.

<sup>281</sup> Commission, 'Commission Staff Working Document: Criteria and guidance for protected areas designation' SWD (2022) 23 final, 10.

<sup>282</sup> The Habitats Directive (n 24) Annex III.

<sup>283</sup> Nature Restoration Regulation 2024 (n 29) preamble 10.

<sup>284</sup> EU Biodiversity Strategy 2030 (n 20) 5.

<sup>285</sup> Commission, 'Commission Staff Working Document: Criteria and guidance for protected areas designation' SWD (2022) 23 final, 8.

<sup>286</sup> See Ch 4.2.1.

Regulation would add value to the current legal system by including areas outside the network in its obligations.

### **5.3 Primary and old-growth forests do not gain value**

As was discovered in Chapter 3, the Annex-based system of the Habitats Directive does not specifically include primary and old-growth forests in the legal protection. This is the case also in the Nature Restoration Regulation. The Nature Restoration Regulation does not fully address the weaknesses arising from the Annex-based system of the Habitats Directive, especially without the explicit inclusion of primary and old-growth forests. Under Article 12 of the Nature Restoration Regulation, which expands the coverage of forests without the Annex-based system, primary and old-growth forests may be included by a Member State choice through the restoration measures. However, a weakness regarding the strict protection of these forests prevails. This is due to the other activities allowed within the concerned areas. The Habitats Directive does not prevent forestry in Natura 2000 sites as forestry can be allowed.<sup>287</sup> The sole focus of the Natura 2000 site does not therefore need to be nature protection.<sup>288</sup> Under the Nature Restoration Regulation, in preparing the national restoration plans, ‘Member States shall identify synergies with [...] forestry. They shall also identify existing [...] forestry practices, [...] that contribute to the objectives of this Regulation’.<sup>289</sup> This can be interpreted as that forestry should work together with the restoration measures. Strict protection means that the natural processes of the area are not disturbed.<sup>290</sup> Thus, the Habitats Directive and the Nature Restoration Regulation are both contrary to strict protection. Neither of the two legislative instruments would directly aid in the achievement of the EU’s strict protection target.

Nevertheless, there is a move away from the Annex-based system in Article 12 of the Nature Restoration Regulation, which increases the flexibility of what may be covered under the restoration measures. Thus, there is a potential for extended forest biodiversity protection

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<sup>287</sup> See Ch 2.2.2.

<sup>288</sup> Commission, *Natura 2000 and Forests Part I-II* (Office for Official Publications of the European Communities 2015) 58.

<sup>289</sup> Nature Restoration Regulation 2024 (n 29) Art 14(10).

<sup>290</sup> EU Biodiversity Strategy 2030 (n 20) 4.

through restoration if the measures cover a wider selection of forest habitats than under the Habitats Directive. However, with Article 3(2) of the Habitats Directive providing for the Member States to contribute in proportion to the Natura 2000 network and Article 4(1) targets of the Nature Restoration Regulation concerning only a proportion of the areas, the coverage of the measures is limited. The added value of the Regulation to the current legal system from this perspective is thus slight, but the flexibility of Article 12 of the Regulation adds value to the current EU legislation.

## 5.4 Deadlines could aid the Habitats Directive

The 2020 targets for biodiversity in the EU were not achieved.<sup>291</sup> Already before the deadline of 2020, it was held that the Habitats and Birds Directives would not allow for the achievement of the targets alone.<sup>292</sup> With the 2030 targets quickly approaching, the need for reform in the EU legal system possibly through the Nature Restoration Regulation is called into question.

The Nature Restoration Regulation sets targets on when and where the restoration measures are to be taken by the Member States.<sup>293</sup> This addresses the Habitats Directive's weakness of not having deadlines and creates a timeline for the measures under the Regulation.

Furthermore, these deadlines in the Nature Restoration Regulation may aid in achieving the Habitats Directive's objectives.<sup>294</sup> According to the preamble of the Nature Restoration Regulation, especially taking measures outside Natura 2000 sites and establishing deadlines for restoration measures is to benefit the objectives of the Habitats Directive.<sup>295</sup>

The Habitats Directive and the Nature Restoration Regulation are planned to work in synergy.<sup>296</sup> This can further benefit the objectives of the Habitats Directive. The territory in

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<sup>291</sup> European Environment Agency, *State of nature in the EU: Results from reporting under the nature directives 2013-2018* (Publications Office of the European Union 2020) 128, 135.

<sup>292</sup> Charles-Hubert Born, An Cliquet and Hendrik Schoukens, 'Introduction' in Charles-Hubert Born and others (eds), *The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?* (Routledge 2015) 5.

<sup>293</sup> Nature Restoration Regulation 2024 (n 29) Arts 4, 12.

<sup>294</sup> *ibid*, preamble 26, 28.

<sup>295</sup> *ibid*.

<sup>296</sup> *ibid*, preamble 66.

which the Nature Restoration Regulation is applicable aligns with the geographical scope of the Habitats Directive.<sup>297</sup> An example of the synergy is Article 14(14)(a) of the Nature Restoration Regulation, which requires the Member States to take into account the Natura 2000 conservation measures under the Habitats Directive in the national restoration plan preparation. Furthermore, Member States are to coordinate the monitoring of Annex I areas under the Regulation with the reporting cycle of Article 17 of the Habitats Directive.<sup>298</sup> The use of the Habitats Directive's Annex I in the Regulation as well as references to the Habitats Directive's definitions in Article 3 of the Nature Restoration Regulation additionally shows that the two instruments complement each other and are designed to apply in parallel.

In conclusion, the deadlines in the Nature Restoration Regulation address the absence of them in the Habitats Directive and could aid in the achievement of the Habitats Directive's objectives. However, having deadlines does not guarantee the achievement of the objectives and targets. There is a lack of accountability in the case of a failure to meet the targets in both instruments, where the Member States are trusted to work towards reversing biodiversity loss in forests without infringement proceedings for a failure to meet the objectives. Therefore, while the Nature Restoration Regulation adds value to the current EU legislation by the creation of deadlines, it does not add accountability to the achievement of objectives.

## **5.5 Added value to forest biodiversity protection**

The Nature Restoration Regulation adds value to the current EU legislation protecting forest biodiversity in multiple ways. To answer the fourth research question, the Regulation adds value by creating obligations to restore, widening the scope of measures and obligations outside the Natura 2000 network, partly moving away from the Annex-based system, and creating deadlines for the targets. The focus of the legal system on both restoration and conservation would provide comprehensive protection for forest biodiversity if the measures were successful in the future.

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<sup>297</sup> Nature Restoration Regulation 2024 (n 29) preamble 24; the Habitats Directive (n 24) Art 2(1).

<sup>298</sup> Nature Restoration Regulation 2024 (n 29) Art 20(6).

However, even together the Habitats Directive and the Nature Restoration Regulation seem to fall short of the 30% protection of land by 2030. There are no provisions for strict protection of primary and old-growth forests. Furthermore, while the Regulation and the Directive can act in parallel by complementing each other's targets and objectives, they do not meet the EU's 2030 commitments of 30% protection and strict protection. As for the 2050 commitments, while the targets of the Nature Restoration Regulation meet the international targets, the extent of protection would remain to be seen depending on the success of the measures. The lack of accountability is another aspect in which the Nature Restoration Regulation does not add value to the legal system. Member States are trusted to take sufficient measures and progress under the targets and objectives. Nevertheless, it can be stated that the added value of the Nature Restoration Regulation would make it a significant addition to the current EU legal system protecting forest biodiversity. The next Chapter will conclude and summarise the findings of this thesis.

## 6 Conclusion

Forest biodiversity is under threat from multiple sources. The current EU legal system has not been able to meet the biodiversity targets in the EU or on an international level. There is a threat that the current legislation is insufficient for forest biodiversity protection through its weaknesses. Thus, the EU legal system is challenged to get back on track in order to meet its commitments and to protect forest biodiversity better. The proposal on the Nature Restoration Regulation could aid in this by addressing the weaknesses of the current EU legal system protecting forest biodiversity.

The Natura 2000 network is currently at the centre of biodiversity protection in the EU legal system. Forests are protected through a direct method of area-based measures with special areas of conservation under the Habitats Directive. On the other hand, the Nature Directives; the Habitats Directive and the Birds Directive create an indirect method of protecting forests through species protection. Although it is the Directive designed for forest protection, the Habitats Directive includes weaknesses, three of which were identified and analysed in this thesis. These are the lack of obligations for forest protection and restoration outside the Natura 2000 network, the Annex-based system, not including primary and old-growth forests, and the absence of deadlines to achieve the objectives of the Habitats Directive.

The proposal on the Nature Restoration Regulation is a new development in the EU legal system aimed at halting biodiversity loss and aiding in the achievement of the EU's commitments. At the time of writing, the Regulation is still waiting for approval of the European Council before it can enter into force. The focus of the Regulation is on the restoration of degraded ecosystems.

The Nature Restoration Regulation addresses the three weaknesses of the Habitats Directive in different ways. The restoration measures established by the Regulation follow area-based measures. The general obligations of Article 4(1) prioritise measures within the Natura 2000 sites until 2030. Beyond this, and with the more specific restoration obligations on forest ecosystems there is a move away from the Natura 2000 sites. The Annex-based system remains present in the general obligations of the Regulation but is excluded from Article 12 on forest restoration. While primary and old-growth forests are not explicitly covered in the



Nature Restoration Regulation either, the flexibility given by Article 12 which does not use the Annex-based system of the Habitats Directive enables the Member States to include these forests within the provision. However, the proportional approach to measures, which is present in Article 3(2) of the Habitats Directive continues in the targets of the Regulation in Article 4(1) which cover only a proportion of the areas. Thus, there is still a limitation to the coverage of the measures. As for achieving its objectives, the Nature Restoration Regulation takes a different approach to the Habitats Directive by setting out target deadlines for when measures are to be taken. This, however, leaves a small gap in the Regulation's response to the weakness, as the Nature Restoration Regulation does not set deadlines for achieving a certain condition on the restoration areas.

Together the Habitats Directive and the Nature Restoration Regulation would cover forest biodiversity protection on a wider scope than the Habitats Directive alone. With a focus on restoration, obligations expanding beyond the Natura 2000 network, a slight move away from the Annex-based system, and the target deadlines, the Nature Restoration Regulation would address the weaknesses of the Habitats Directive. Therefore, the added value provided to the current EU legislation by the Nature Restoration Regulation would be significant.

Further research on the Nature Restoration Regulation will be needed whether or not the Regulation enters into force. If the Council does not adopt the Regulation, research on how the weaknesses of the Habitats Directive can be remedied to aid in the achievement of the EU and international biodiversity targets is needed.

The past failures to meet the EU and international biodiversity targets show that urgent action to halt biodiversity loss is needed. With forests being at the heart of biodiversity and degrading rapidly, better measures to conserve and restore them are needed. While the proposal on the Nature Restoration Regulation may not enable the EU to meet the 2030 commitments on biodiversity, it addresses the weaknesses of the Habitats Directive. If the Council fails to adopt the proposal into legislation, the EU legal system is threatened to become insufficient for forest biodiversity protection.

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