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Achieving Sustainable Development in Times of Crisis

Evaluating How the Proposal to Fast Track the Swedish Environmental Permit Procedure Aligns with the EU's Nature Protection Framework Through the Lens of Sustainable Development

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Abstract

In the wake of recent global crises, the Swedish Government appointed a committee investigating the feasibility of fast tracking the environmental permit procedure for essential public activities, which delivered its proposal in 2023. The proposal has implications for several EU legal acts aimed at protecting the environment and reflects an attempt to balance the three dimensions of sustainable development. Therefore, this thesis seeks to answer how the proposal aligns with the EU's nature protection framework and hence the objective of sustainable development. This thesis first analyzes how sustainable development is implemented at the EU level, before proceeding to present the Swedish proposal. Subsequently, the conformity of the proposal with the exemption clauses under the EU's nature protection framework is analyzed, as the derogation clauses provide for the balance among the three dimensions of sustainable development. The findings of this thesis suggest that the proposal potentially contradicts Sweden's obligations under EU law, as it seemingly prioritizes social and economic interests over the high level of environmental protection required by EU law.

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1 Introduction

1.1 Background

Recent global events such as the Covid-19 pandemic, Russia's invasion of Ukraine, economic crises, and the ongoing effects of climate change have prompted the Swedish Government to review Sweden's capacity to handle crises.[1] It is argued that one of the fundaments of crisis management is supply readiness, i.e., maintaining essential functions in the society and providing the population with basic goods and services.[2] A prerequisite for carrying out certain activities, such as environmentally hazardous activities, and thus supplying the services and goods referred to, is that the activity or project holds a valid permit under the Swedish Environmental Code.[3]

The foregoing has culminated to an investigation into how Sweden may amend its environmental permit procedure to be able to meet urgent societal needs, to better manage current and future crises.[4] For this reason, in 2022 the Swedish Government appointed an investigation relating to the Government's ability to decide on temporary environmental permits for essential public activities of time-critical nature.[5] In February 2023, the appointed investigation committee delivered its proposals for legislative changes in the report 'Temporary environmental permit for essential activities – for increased security of supply, SOU 2023:11' (henceforth referred to as SOU 2023:11, the proposals, or the report).[6]

The Swedish Environmental Code requires certain types of activities or measures to undergo permit procedures to obtain a permit to conduct the activity or measure in question, with the aim to minimize, regulate, and control impacts on the environment.[7] Examples of activities that

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[1] SOU 2023:11, 'Tillfälligt miljötillstånd för samhällsviktig verksamhet – för ökad försörjningsberedskap' (24 February 2023) 27.
[2] ibid 27.
[3] Gabriel Michanek and Charlotta Zetterberg, *Den Svenska Miljörätten* (5th edn, Iustus 2021) 52–53.
[4] SOU 2023:11 (n 1) 29.
[5] Regeringen, 'Tillfälligt miljötillstånd för samhällsviktig verksamhet – för ökad försörjningsberedskap' (*Regeringen*, 24 February 2023) <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2023/02/sou-202311/> accessed 5 February 2024.
[6] A SOU is a report produced by a special committee appointed to investigate a particular issue, before the Government presents a bill. See more information here: Regeringskansliet, 'Statens offentliga utredningar' (*Regeringskansliet*) <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/> accessed 7 May 2024.
[7] Michanek and Zetterberg (n 3) 52–53.

require an environmental permit includes environmentally hazardous activities,[8] water activities,[9] and activities or measures that may significantly affect the environment in a Natura 2000 site.[10] To obtain an environmental permit, some activities or measures require a specific environmental impact assessment (EIA), which means that environmental effects of the activity or measure shall be identified, described, and assessed.[11] Additionally, authorization of activities or measures that may significantly affect the environment in a Natura 2000 site can only be granted after the potential impacts on the site has been assessed.[12] The requirement to carry out an assessment on the potential environmental impacts prior to granting a permit for certain project or activities derives from obligations under European Union (EU) law, such as the EIA Directive and the Habitats Directive.[13] Thus, the implementation of obligations from EU level constitutes a significant role in the rules governing the permit procedure for environmental permits in the Swedish Environmental Code.[14]

In general, permit applications in Sweden are handled by the County Administrative Board or the Land and Environmental Courts.[15] The rules on permit procedures and the instance hierarchy under the Environmental Code are intended to ensure an informed, coordinated, and efficient assessment.[16] However, members of the Swedish Parliament have argued that for some type of activities the total environmental permit process can take up to 10 years from the submission of the permit application to a final decision.[17] Although statistics indicate that the

[8] Environmentally hazardous activities include activities that cause pollution of soil, water and air, as well as other types of disturbance such as radiation and noise, see definition in Swedish Environmental Code (1998:808) [Miljöbalk (1998:808)] (entered into force 11 June 1998) (SEC) chapter 9 para 1.
[9] Water activities include a wide range of activities such as the construction, modification, repair or demolition of a structure in a body of water, filling or piling in a body of water, the removal of water from a body of water, and excavation, blasting or dredging in a body of water, see defintion in SEC (n 8) chapter 11 para 3.
[10] SEC (n 8) see chapters 7, 9, and 11; Natura 2000 sites are defined under SEC (n 8) chapter 7 para 27 and will be discussed more in detail in section 2.2.3.2.
[11] Michanek and Zetterberg (n 3) 206; SEC (n 8) chapter 6.
[12] SEC (n 8) chapter 7 para 28b.
[13] Council Directive 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7 (Habitats Directive); Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L 26/1 (EIA Directive).
[14] Michanek and Zetterberg (n 3) 206, 251, and 304.
[15] Jan Darpö, 'EU-rätten och den processuella autonomin på miljöområdet – Om det svenska systemet med tillåtlighetsförklaringar och mötet med europarätten' (2012) 2 Nordic Environmental Law Journal 5; SEC (n 8) chapter 7 para 29b, chapter 9 para 8, chapter 11 para 9b.
[16] SOU 2023:11 (n 1) 29.
[17] Sveriges riksdag, 'Motion 2021/22:1951: Kortare handläggningstider för miljötillstånd' (*Riksdagen*, 2021) <https://www.riksdagen.se/sv/dokument-och-lagar/dokument/motion/kortare-handlaggningstider-for-miljotillstand-_h9021951/> accessed 22 February 2024.

handling time is often considerably shorter than the aforementioned,[18] it has been suggested that the existing rules risks causing lengthy and delayed procedures for essential public activities, which may hamper the ability to mitigate a potential supply crisis.[19]

In contrast to the standard permit procedure, in SOU 2023:11 it is proposed that an opportunity for the Swedish Government to examine applications for temporary permits for environmentally hazardous activities, water activities, and activities that may affect a Natura 2000 site shall be introduced.[20] In addition, a possibility for the Government to exempt certain activities or measures from the requirement to carry out an EIA is suggested.[21] These proposals shall be applicable for activities that are required to satisfy essential public interests where there is a risk of serious social consequences if the need is not met, and where no other satisfactory alternatives are available.[22] The aim with the legislative proposals is to avoid the negative consequences for society that would be caused by an interruption in the supply of essential goods and services.[23]

Considering the report's aim to streamline the procedure for certain activities to obtain an environmental permit, the proposals in SOU 2023:11 can be said to reflect a wish to balance the protection of the environment with the necessity to satisfy other societal needs. This balance between different societal interests may be considered to reflect elements of sustainable development, which give rise to a strong linkage between economic, social, and ecological development and can be considered a fundamental concept of environmental law.[24] In this regard, it should be underlined that sustainable development is one of the objectives that the EU shall aim to achieve according to EU primary law and the objective of Swedish environmental legislation.[25] However, the general wording and the multifaceted nature of the concept makes it difficult to define and interpret in concrete terms, especially when different interests of the concept are in conflict.[26] The argumentation leading up to the proposals in SOU

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[18] Naturvårdsverket, 'Uppdrag att analysera statistik för miljötillståndsprövningen under 2022: Redovisning av regeringsuppdrag KN2023/03355' (15 June 2023) NV-10889-22, 4.
[19] SOU 2023:11 (n 1) 29.
[20] ibid 55.
[21] ibid 89.
[22] ibid 55
[23] ibid 30.
[24] David Langlet and Said Mahmoudi, *EU Environmental Law and Policy* (OUP 2016) 42.
[25] Consolidated Version of The Treaty on European Union [2012] OJ C 326/13 (TEU) art. 3(3); SEC (n 8) chapter 1 para 1.
[26] Langlet and Mahmoudi (n 24) 44.

2023:11 can be seen as an expression of such a conflict, where the current permit procedure aimed at protecting the environment is said to be a potential obstacle to the Swedish economy and the well-being of the population.

According to the principle of sincere cooperation, Member States of the EU shall adopt all measures necessary to fulfil their obligations under EU law and shall refrain from actions that may undermine the attainment of the EU's objectives.[27] Given that elements of the permit procedure in Sweden, such as the requirement to carry out an EIA for certain projects and investigate potential impacts on Natura 2000 sites prior to granting environmental permits to plans or projects, is shaped by mandatory EU rules on the matter, it is crucial that the proposals presented in SOU 2023:11 remain in line with Sweden's obligations under EU law. Further, it is also pertinent that the proposals strive to achieve, or at the very least, not undermine the aim of sustainable development, considering that it is one of the EU's objectives.

1.2 Purpose and Research Question

The purpose of this thesis is to investigate how the EU implements and interprets the concept of sustainable development to understand how EU law strives to balance economic, social, and environmental interests. Through the lens of sustainable development under EU law, the alignment of the legislative proposals in SOU 2023:11 with Sweden's obligations under the EU's nature protection framework will be assessed.[28]

Therefore, this thesis seeks to answer the following question: *How does the proposal to fast track the Swedish environmental permit procedure align with the EU's nature protection framework and hence the objective of sustainable development?*

1.3 Method and Material

This thesis will primarily follow the doctrinal legal research approach. The main characteristics of the method at hand is that it strives to systematize and assess the relationship between the

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[27] TEU (n 25) art. 4(3).
[28] The term 'nature protection framework' will refer in this thesis to the EIA Directive and the provisions relevant for Natura 2000 sites undder the Habitats Directive and the Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2009] OJ L 20/7 (Birds Directive).

different legal norms within a particular field of law, with the aim to solve unclarities and gaps in the existing law.[29] Another feature of the legal doctrinal approach is the internal perspective to the legal system, i.e., that rules, principles, and other authoritative sources derived from the legal system forms the basis for the argumentation.[30] Considering the aim with this thesis it must be argued that it will look at law from the inside, as the system of rules forms the basis for the research and the applicable law will be used as the normative framework against which the research object is analyzed.

In a first instance, this thesis is intended to develop the lens of the thesis through which the research subject, namely the legislative proposals in SOU 2023:11, will be analyzed. Given the lens the thesis seeks to employ is how the EU balances the different dimensions of sustainable development, it is of utmost importance to establish how relevant EU law defines, implements, and interprets the concept of sustainable development. First, a concise subsection is devoted to the roots of sustainable development in international law, which renders it relevant to describe the relationship of EU law to these sources of law. However, it must be emphasized that the aim is not to engage in an analysis of the binding nature of international law within the EU legal order. Furthermore, it is non-binding sources of international law, often referred to as soft law,[31] which will be of attention for this thesis. Therefore, the intention is rather to discuss how the definitions and interpretation of sustainable development under these soft law instruments at the international level have guided the implementation of sustainable development at EU level. Yet, for the sake of clarification, it can be stated that the EU has a legal personality, making it possible for the EU to enter into international agreements which becomes binding on the Union and its Member States.[32]

Furthermore, the provisions addressing sustainable development under the Treaty on EU (TEU), the Treaty on the Functioning of the EU (TFEU) as well as the Charter of Fundamental Rights of the EU will be analyzed, as these acts constitute EU primary law.[33] Although the

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[29] Jan M. Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' (2015) M-EPLI 207, 210.
[30] Terry Hutchinson and Nigel James Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) Deakin Law Review 83, 114.
[31] 'soft law' *A Dictionary of Law* (8th edn, OUP 2015).
[32] TEU (n 25) art. 47; Consolidated Version of The Treaty of the Functioning of the European Union [2012] OJ C326/47 (TFEU) art. 216.
[33] TEU (n 25) arts. 1(3) and 6(1); TFEU (n 32) art. 1(2); Charter of Fundamental Rights of the European Union [2000] OJ C 364/1, art. 37.

Charter has the same legal status as the TEU and the TFEU and the Treaty provisions must be constructed in the light of the Charter, the two Treaties constitute the foundation of the EU that all other secondary sources of law derive their legal basis from, which is why greater devotion will be provided to the relevant provisions under the Treaties rather than the Charter.[34] To implement the objectives set out under EU primary law, secondary sources of EU law, such as directives and regulations, are adopted by the EU institutions.[35] Therefore, examining EU secondary law deemed relevant may provide a more precise explanation of how the concept of sustainable development should be implemented according to EU law. The secondary legislation of primary importance for this thesis are the EIA Directive and the Habitats Directive,[36] constituting EU secondary law in line with Article 288 TFEU. Considering the scope of certain provisions of the secondary legislation that will be analyzed throughout this thesis has been clarified by interpretation from the Court of Justice of the EU (CJEU), relevant cases from the Court will be addressed to ensure an accurate representation of what the different EU obligations entail.

In addition, policy documents from the EU institutions will be presented, to gain a deeper understanding of how the EU strives to attain the objective of sustainable development through the legal rules discussed under the concerned chapter of the thesis. Considering that policy documents are not sources of law within the meaning of the doctrinal legal research method, these sources will be used to support the legal argumentation when defining sustainable development in the second chapter of the thesis. These sources may, however, reflect the direction of EU law given that objectives and priorities for the Union are outlined. Thus, policy documents will mainly be utilized to elucidate the relationship between EU law and the international legal sources discussed, as well as to illustrate how the implementation of sustainable development under EU law has evolved over the years.

In a second instance, this thesis adopts a descriptive approach when presenting the proposals outlined in SOU 2023:11.[37] In addition to presenting and discussing the primary proposals in the report, the purpose of this part of the thesis is to briefly explain the relevant parts of the Swedish environmental permit procedure and the criticism against it. Therefore, rules relevant

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[34] Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (6th edn, OUP 2015) 111.
[35] TFEU (n 32) art. 288; Langlet and Mahmoudi (n 24) 15.
[36] Habitats Directive (n 13); EIA Directive (n 13).
[37] SOU 2023:11 (n 1).

for the existing permit procedure and environmental assessments under the Swedish Environmental Code will be reviewed.[38] Particularly noteworthy in this context is the case involving Cementa AB,[39] as it serves as a pivotal argument for the proposals set forth in SOU 2023:11, along with subsequent developments stemming from the case. As the doctrine constitutes a crucial legal source of the doctrinal legal research approach,[40] literature from scholars within Swedish environmental law will be used as a supportive tool when describing the Swedish rules relevant for this part of the thesis.

It should be emphasized that SOU 2023:11 is exclusively available in an official Swedish version and most of the legal sources used for the third chapter of this thesis are written in Swedish. Thus, concepts that are central to the Swedish permit procedure and more specifically to the proposals in SOU 2023:11 discussed throughout this thesis have necessitated translation into English, albeit lacking official translations. Considering this, Swedish concepts integral to the thesis's objective will be presented, in addition to the English words used through the thesis, in their original language to enhance transparency.

Moreover, to utilize the lens developed to assess the domestic law proposal presented in the light of relevant EU law, the relationship between the EU and the Swedish legal systems needs to be addressed. Fundamental in this regard is that EU law takes precedence over national law, in accordance with the principle of supremacy.[41] It is therefore not required to discuss which legal system should prevail if legal rules of the two systems are in contradiction. By contrast, principles deriving from the primary sources of EU law, e.g., the principles of subsidiarity,[42] sincere cooperation,[43] and proportionality,[44] will be analyzed and interpreted throughout the thesis to assess what the EU considers to be appropriate conduct on the part of Member States in achieving the objective of sustainable development.

[38] SEC (n 8).
[39] In this context, the term *case* refers to several court decisions, a government decision and a temporary law adopted for the purpose of the government decision. See more information in section 3.1.2.
[40] Aleksander Peczenik, *On Law and Reason* (1st edn, Springer Dordrecht 2014) 361.
[41] Case 6/64 *Costa v ENEL* (1964) ECLI:EU:C:1964:66.
[42] TEU (n 25) art. 5(3).
[43] ibid art. 4(3).
[44] ibid art. 5(4).

Finally, in the fourth chapter, when evaluating how the proposals in SOU 2023:11 comply with the relevant obligations under the EU's nature protection framework in the light of sustainable development, the circumstances in the Cementa case presented in chapter three will be used to support the argumentation. This is not because the proposals will be applicable solely to the same types of activities as Cementa AB. Rather, it is due to that the legislative proposals in SOU 2023:11 have neither been treated by the Government nor have any legal scholars commented on the matter yet. Thus, the provisional chapter under the Swedish Environmental Code adopted and applied in the Cementa case is possibly the only available material that may provide an indication as to how the legislative proposals in SOU 2023:11 will be applied in practice, given the similarity with the proposals at hand.

1.4 Delimitations

This thesis will primarily focus on two key EU legal acts: the EIA Directive and the provisions regulating Natura 2000 sites under Habitats Directive. The Birds Directive is addressed indirectly through the provisions on Natura 2000 sites.[45] Although the proposals in SOU 2023:11 have implications for several EU legal acts, such as the EIA Directive, the Industrial Emissions Directive, the Birds Directive, the Habitats Directive, the Seveso-III Directive, the Water Framework Directive as well as the provisions under the Aarhus Convention concerning public participation,[46] this thesis will limit its discussion to those instruments most directly impacted by the proposals and relevant for the aim of the thesis.

Consequently, significant attention will be devoted to the EIA Directive, given that the proposals in SOU 2023:11 aim to utilize the exception clause under the relevant Directive.[47] Additionally, the proposals in SOU 2023:11 are intended to cover permits required for Natura 2000 sites, which have distinct environmental assessment requirements from those under the EIA Directive.[48] The CJEU has furthermore interpreted the protection regime for Natura 2000

[45] Article 7 of the Habitats Directive stipulates that the protection regime for Natura 2000 sites under Article 6 (2), (3) and (4) of the Habitats Directive shall replace any obligations arising under the first sentence of Article 4 (4) of the Birds Directive in respect of special protection areas pursuant to Article 4 (1) or similarly recognized under Article 4 (2) thereof.
[46] SOU 2023:11 (n 1) see section 3.2.
[47] ibid 90; EIA Directive (n 13) art. 2(4).
[48] SOU 2023:11 (n 1) 55.

sites strictly. Therefore, the thesis will also delve into the protection regime for Natura 2000 sites as outlined in the Habitats Directive.[49]

1.5 Structure

This thesis is divided into five main chapters. Following the introductory chapter, the purpose of the second chapter is to examine how the EU has implemented sustainable development and strives to balance the elements of the concept. For this purpose, the chapter will begin with a description of the international and historical background of the concept, to understand its roots and the main essence. Subsequently, a discussion will follow regarding what the balance between the elements of sustainable development entails. Further, an analysis of how the EU has implemented sustainable development will follow, by examining provisions under both EU primary and secondary law of relevance for the thesis, as well as EU policy documents. Supported by the findings made throughout the chapter, this section will conclude with an analysis of how the balance between the different dimensions of sustainable development is reflected in EU law.

The third chapter of this thesis is dedicated to the Swedish regulatory framework. Firstly, to provide the reader with the background to the legislative proposals put forward in SOU 2023:11, the chapter will commence with a description the parts of the permit procedure and the environmental assessment requirements in Swedish law that are relevant for this thesis. Secondly, the debate on the appropriateness of the Swedish permit procedure for environmental permits will be briefly outlined, including a description of the circumstances of the Cementa case. Thirdly, the key legal proposals in SOU 2023:11 will be described and discussed.

In the fourth chapter, the key legislative proposals in SOU 2023:11 will be evaluated against the relevant provisions under the EU's nature protection framework. Beyond this, a discussion will follow on the significance of the proposal being intended for crisis situations. The intention is to address and answer the overarching research question: whether the proposals in SOU 2023:11 are in line with the EU's nature protection framework and hence the objective of sustainable development. The fifth and final chapter will summarize and clearly present the conclusions that have been reached throughout the thesis.

[49] Habitats Directive (n 13) arts. 6(2)–6(4).

2 Defining the Lens of Sustainable Development

2.1 Introduction

The overall aim of this chapter is to establish the lens of sustainable development that will guide the analysis of this thesis. Therefore, this chapter will first present the origins of sustainable development, with the rationale of understanding the essence of the concept. Secondly, this chapter will delve into the provisions relevant for overarching research question under EU primary and secondary law as well as EU policy documents, to examine how the EU has implemented the concept of sustainable development and aims to balance the three dimensions of the concept.

2.2 Historical and International Background

Given that sustainable development as a concept originates from international law and is enshrined in a range of global instruments,[50] it is relevant to present and analyze the internationally recognized definition(s) of sustainable development. The emphasis on the possible existence of multiple definitions is due to the absence of a universally accepted definition of sustainable development.[51] Hence, a discussion of the meaning of the term is essential for the purpose of this thesis by assessing different instruments on the matter.

2.2.1 The Brundtland Report

The Report of the World Commission on Environment and Development, *Our Common Future,*[52] often referred to as the Brundtland Report, is commonly recognized as introducing the concept of sustainable development to the international agenda.[53] Although the concept of sustainability had emerged as a concept prior to the Report, it was not until the Report was published in 1987 that the links between the social, economic, and ecological dimensions of development were explicitly dealt with.[54] The Report was thus innovative for its time in

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[50] Marie-Claire Cordonier Segger, 'Sustainable Development in International Law' in Hans Cristian Bugge and Christina Voigt (eds), *Sustainable Development in International and National Law* (Europa Law Publishing 2008) 91 – 116.
[51] ibid 116.
[52] World Commission On Environment and Development, 'Our Common Future', UNGA doc. A/42/427 (Brundtland Report).
[53] Ben Purvis, Yong Mao, and Darren Robinson, 'Three pillars of sustainability: in search of conceptual origins' (2018) 14 Sustainability Science 681, 684; David Langlet and Said Mahmoudi, *EU Environmental Law and Policy* (OUP 2016) 42.
[54] Susan Baker, *Sustainable Development* (Taylor & Francis Group 2015) 23.

advocating a new form of societal change, one that links development, normally considered an economic and social goal, with sustainability, traditionally an ecological goal.[55]

Furthermore, the Brundtland Report defines sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to satisfy their own needs.'[56] The definition is global in its scope and has a strong focus on both intra-generational and inter-generational equity.[57] Although the definition of the concept was groundbreaking for its time in combining different societal objectives, scholars have argued that the Brundtland definition is merely a carefully political balance.[58]

Despite the Report being published over 35 years ago, the Brundtland definition is still considered the internationally recognized definition of sustainable development.[59] However, it is not precise enough to provide guidance on how the concept should be implemented.[60] Instead, it can be argued that the Brundtland definition states the goal of sustainable development, rather than articulating the content of the concept.[61]

2.2.2 Rio Declaration on Environment and Development

Following the Brundtland Report, in 1992 the United Nations (UN) held a conference in Rio de Janeiro on the Environment and Development.[62] The two key issues addressed during the conference concerned the link between the environment and development, and how to practically promote sustainable development with a specific focus on policies balancing

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[55] ibid 24.
[56] Brundtland Report (n 52) para 27.
[57] Baker (n 54) 46–47; For a definition of intra-generational equity see Shelton Dinah, 'Equity' in in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008) 642; For a definition of inter-generational equity see 'intergenerational equity' *A Dictionary of Environment and Conservation* (1st edn, OUP 2007).
[58] Duncan French, 'Sustainable Development' in Malgosia Fitzmaurice, Marcel Brus, Panos Merkouris, and Agnes Rydberg (eds), Research Handbook on International Environmental Law (Edward Elgar Publishing Limited 2021) 132.
[59] Gyula Bándi, 'Principles of EU Environmental Law Including (the Objective of) Sustainable Development' in Marjan Peeter and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing Limited 2020) 37.
[60] Baker (n 54) 32.
[61] Sander R.W. van Hees, 'Sustainable Development in the EU: Redefining and Operationalizing the Concept' (2014) 10(2) Utrecht Law Review 60, 71.
[62] United Nations, 'United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992' (*United Nations*) <https://www.un.org/en/conferences/environment/rio1992> accessed 20 February 2024.

economic, social, and environmental interests.[63] Hence, aiming at clarifying how the concept coined in the Brundtland Report should be implemented in practice. As a result of the conference, the Rio Declaration on Environment and Development was agreed, containing 27 principles intended to guide future sustainable development.[64] To put these principles into action, Agenda 21 was adopted, which constitute a comprehensive plan of action to promote sustainable development across a wide range of areas.[65]

Despite outlining various elements of sustainable development, neither the Rio Declaration nor Agenda 21 provided a new definition of the concept. It may, however, be argued that the Rio Declaration provides more guidance, in comparison to the Brundtland definition, on what the concept entails and how to balance the interaction between the different societal goals. For example, under principle 4 of the Declaration, it is stated that to achieve sustainable development, 'environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.' Yet, uncertainties remained among States as to the exact scope and meaning of the concept, and how this should be implemented.[66]

However, an example of when sustainable development, as formulated in the Rio Declaration, have been interpreted in adjudication is the 1997 *Gabčíkovo-Nagymaros* judgment.[67] In the concerned judgment, the parties agreed that the concept of sustainable development was applicable to the dispute at hand.[68] The International Court of Justice (ICJ) recognized sustainable development as a concept and called upon the parties to avail themselves to it in resolving their dispute.[69] In a separate opinion by Judge Weeramantry, the Judge further argued that sustainable development should be considered a principle with normative value.[70] Furthermore, in the 2005 *Iron Rhine* arbitration between Belgium and France, the Arbitral Tribunal held that the environmental protection measures necessary for the activity in question

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[63] Baker (n 54) 142.
[64] Rio Declaration on Environment and Development (14 June 1992) 31 ILM 874 (1992) (Rio Declaration).
[65] Report of the United Nations Conference on Environment and Development: Agenda 21 (Rio de Janeiro, 3–14 June 1992) UN Doc. A/CONF.151/26 (Vol. I) (Agenda 21).
[66] Ulrich Beyerlin, 'Different Types of Norms In International Environmental Law Policies, Principles, And Rules' in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008) 443.
[67] Gabčíkovo-Nagymaros (Hungary v Slovakia) (Judgement) ICJ Reports 1997 p. 7.
[68] ibid.
[69] ibid para 140.
[70] *Gabčíkovo-Nagymaros* (Hungary v Slovakia) (Separate Opinion of Vice-President Weeramantry) ICJ Reports 1997 p. 7.

required full integration into the project and its costs.[71] This part of the award can be argued to reflect principle 4 of the Rio Declaration,[72] thus offering a further indication of how sustainable development, as expressed in the Declaration, should be implemented by States in practice.

2.2.3 United Nations Sustainable Development Goals

A more recent development is the Resolution establishing the United Nations Sustainable Development Goals (SDGs), adopted in 2015.[73] The Resolution with the name 'Transforming our world: the 2030 Agenda for Sustainable Development' sets out 17 sustainable development goals together with 169 associated targets that outlines the international agenda for sustainable development for the period until 2030.[74] The Resolution reaffirms, *inter alia*, the principles of the Rio Declaration.[75]

The SDGs range widely in their scope, from gender equality to sustainable economic growth, thus incorporating a broader understanding of sustainable development.[76] Despite the broad scope, it is underlined in the Resolution that all the goals and targets balance the three dimensions of sustainable development, namely the economic, social, and environmental.[77] However, due to the wide range of matters covered under the SDGs, it can be invoked that some issues will need to take priority over others.[78] In this regard, certain scholars have argued that environmental protection should take priority in case of a conflict between the goals, considering that sustainable development arose from primarily ecological concerns.[79] However, this view is not clearly reflected in the Resolution itself, as the SDGs never unambiguously prioritizes environmental protection over economic and social development.[80]

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[71] *Iron Rhine Arbitration* (Belgium v Netherlands) (Award) (24 May 2005) Case no 2003-02 PCA, para 223.
[72] Cordonier Segger (n 50) 125.
[73] UNGA, 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015) A/RES/70/1 (UN SDGs).
[74] ibid.
[75] ibid para 12.
[76] French (n 58) 133.
[77] UN SDGs (n 73) para 2.
[78] Bándi (n 59) 41.
[79] ibid.
[80] Jorge E. Viñuales, 'Sustainable Development' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, OUP 2021) 288.

2.2.4 The Three Dimensions

As can be seen from the brief description of the history of sustainable development above, there is still a lack of clarity about its meaning and scope. This ambiguity has led to inconsistency in how the concept is used.[81] However, there appears to be a general understanding that the concept may be characterized by the relationship and interaction between three dimensions; the economic, social, and environmental pillars.[82] This is also how sustainable development will be understood throughout this thesis, as a balance between three different societal interests.

The origins of the three dimensional approach to sustainable development can implicitly be traced back to both the Brundtland Report and Agenda 21, even though neither of the two instruments explain the conceptual framework for these dimensions.[83] Under the Resolution adopting the UN SDGs, the three dimensions are explicitly referred to as the fundaments of the concept, where the achievement of sustainable development depends upon an integrated and balanced approach to the three dimensions.[84] However, considering that each of the 17 SDGs arguably constitute goals primarily attributed to one of the three dimensions,[85] the Resolution provides little guidance on how to balance between the economic, social, and environmental dimensions.

Despite the scattered conceptualization of the concept, there is a broad recognition among scholars that the three goals of sustainable development cannot be achieved at the same time or to the same extent.[86] Instead, greater priority will often be granted to one dimension or the other, and trade-offs must be made.[87] While some scholars argue that the environmental dimension should take precedence due to the origins of the concept, others highlight the political reality where emphasis is frequently placed on the economic dimension.[88] Beyond that, Winter argues

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[81] Baker (n 54) 35.
[82] Langlet and Mahmoudi (n 53) 42; Bob Giddings, Bill Hopwood, and Geoff O'Brien 'Environment, Economy and Society: Fitting Them Together into Sustainable Development' (2002) 10 Sustainable Development 187, 189; Gerd Winter, 'A Fundament and Two Pillars: The Concept of Sustainable Development 20 Years after the Brundtland Report' in Hans Cristian Bugge and Christina Voigt (eds), *Sustainable Development in International and National Law* (Europa Law Publishing 2008) 25.
[83] Purvis, Mao, and Robinson (n 53) 686.
[84] UN SDGs (n 73) para 2.
[85] Edward B. Barbier and Joanne C. Burgess 'The Sustainable Development Goals and the systems approach to sustainability' (2017) 11(1) Economics <https://doi.org/10.5018/economics-ejournal.ja.2017-28> accessed 15 March 2024.
[86] Purvis, Mao, and Robinson (n 53) 685; Winter (n 82) 28.
[87] Giddings, Hopwood, and O'Brien (n 82) 189.
[88] ibid 190-191; Bándi (n 59) 41.

that the ecological dimension should be considered the fundament of the concept rather than a pillar to be balanced against the economic and social dimensions, by emphasizing the critical interdependence of human survival with the state of the biosphere.[89] The debate among scholars on how the different dimensions of the concept shall be balanced highlights the difficulty of interpreting sustainable development in concrete cases, when different societal interests are in conflict.

2.3 Sustainable Development under EU Law

This part of the chapter will review how the EU has implemented the concept of sustainable development. The adoption of the Amsterdam Treaty of 1999 marks the introduction of the term sustainable development into EU law.[90] More than 20 years have passed since the Treaty of Amsterdam entered into force and the foundations of the Union have been reformed twice since then.[91] Therefore, in addition to addressing EU primary law and secondary law relevant to this thesis, it is also appropriate to examine EU policy documents relating to the concept of sustainable development, to understand the evolution of the concept under EU law.

2.3.1 EU Primary Law

Since the end of the 20th century and the EU's Fifth Environment Action Programme, sustainable development has been prominent on the EU agenda.[92] Today, the concept of sustainable development can be found both in the preamble to the Treaty on European Union (TEU) and as one of the objectives that the EU shall aim to achieve under Article 3(3) TEU.[93] In addition, the principle of integration under Article 11 of the Treaty on the Functioning of the European Union (TFEU) stipulates that environmental protection requirements shall be integrated into the definition and implementation of EU's policies and activities, with the aim of promoting sustainable development.[94] Environmental protection requirements are not defined under the treaties, but it arguably refers to the environmental objective under Article

[89] Winter (n 82) 27.
[90] Ludwig Krämer, 'Sustainable Development in EC Law' in Hans Cristian Bugge and Christina Voigt (eds), *Sustainable Development in International and National Law* (Europa Law Publishing 2008) 377.
[91] European Union, 'Founding agreements' (EU) < https://european-union.europa.eu/principles-countries-history/principles-and-values/founding-agreements_en> accessed 7 May 2024.
[92] Langlet and Mahmoudi (n 53) 30.
[93] Consolidated Version of The Treaty on European Union [2012] OJ C 326/13 (TEU).
[94] Consolidated Version of The Treaty of the Functioning of the European Union [2012] OJ C326/47 (TFEU).

191 TFEU.[95] The close relationship between the integration requirement and sustainable development is further reiterated under Article 37 of the Charter of the Fundamental Rights of the EU.[96]

Neither the TFEU nor the TEU provide for a definition of sustainable development. However, to some extent the Treaties clarifies how sustainable development should be implemented and achieved, namely trough policy integration.[97] It should be emphasized that the wording of the integration principle does not prioritize environmental protection above other policy objectives.[98] Instead, it mandates that environmental considerations must be duly considered when taking decisions that may have social or economic implications.[99] Krämer suggests that the wording of Article 11 TFEU implies that sustainable development can only be achieved by integrating environmental requirements into other EU policies.[100] Interpreted in this manner, sustainable development under EU primary law is understood as a process of integrating environmental considerations into broader policy frameworks, rather than as a standalone objective.

Besides not offering a clear definition of the concept, none of the Treaties provides for any treaty ground on how a potential conflict between different objectives of the EU shall be resolved.[101] The lack of guidance on how to balance different societal interest can be argued to be particularly challenging with regards to the objective of sustainable development under Article 3(3) TEU, as several different, contrasting, objectives are presented alongside.[102] However, the principles of proportionality and subsidiarity may have an influence on how to resolve a potential conflict between different policy objectives of sustainable development, such as economic growth and a high level of protection of the environment.[103] While the

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[95] Ludwig Krämer, 'Giving a voice to the challenging the practice environmental requirements EU policies environment by of integrating into other' in Suzanne Kingston (ed), *European Perspectives on Environmental Law and Governance* (Taylor & Francis Group 2012) 85.
[96] Charter of Fundamental Rights of the European Union [2000] OJ C 364/1, art. 37.
[97] van Hees (n 61) 63.
[98] Melina Malafry, *Biodiversity Protection in an Aspiring Carbon-Neutral Society: A Legal Study on the Relationship between Renewable Energy and Biodiversity in a European Union Context* (Uppsala University 2016) 93.
[99] ibid.
[100] Krämer (n 95) 87.
[101] Maria M. Kenig-Witkowska, 'The Concept of Sustainable Development in the European Union Policy and Law' (2017) 1 JCULP 64, 69.
[102] TEU (n 93) art. 3(3).
[103] Kenig-Witkowska (n 101) 69.

principle of proportionality stipulates that EU action shall not exceed what is necessary to achieve the objectives of the EU treaties, the principle of subsidiarity implies that the EU shall only act in so far as the objective will be better achieved at EU level than at individual Member State level, in areas of shared competence.[104]

In addition to providing constraints on the extent to which the EU can exercise its powers, the principles may have a guiding influence on how Member States shall balance different societal interest in their interpretation of EU law, as exemplified in the *Puglia* case.[105] The case at hand addressed a prohibition of wind power installations of a certain size on Natura 2000 sites without any prior assessment of the environmental impact of the project on the specific site concerned. The CJEU considered the national law to be in conformity with EU law.[106] Yet, the CJEU concluded that it was for the national court to establish whether the restriction on the deployment of renewable energy sources was proportionate with the aim of protecting the environment.[107] Although the CJEU did not explicitly address whether the provision in question was in line with the principle of proportionality, the Court emphasized that the Directives discussed in the proceedings were adopted in accordance with Article 192 TFEU, which allows Member States to introduce more stringent measures with the aim of protecting the environment.[108]

Furthermore, it follows from Article 7 TFEU that the EU shall, while taking all its objectives into account, ensure consistency between its policies and activities.[109] This provision thus indicates that EU policies and legislative acts should be construed in uniformity, or at the very least not in contradiction, to the objective of sustainable development as expressed under Article 3(3) TEU.[110] In this regard, Krämer argues that while Article 7 TFEU provides that all EU objectives shall be taken into account when pursuing EU policies, particular attention shall be devoted to the protection and improvement of the quality of the environment, as these policy objectives pursue the EU's fundamental goal of sustainable development.[111] As regards the

[104] TEU (n 93) art. 5(3) and (4).
[105] Case C-2/10, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* (Puglia) (2011) ECLI:EU:C:2011:502.
[106] ibid para 75.
[107] ibid para 74.
[108] ibid paras 48–50; TFEU (n 94) art. 193.
[109] TFEU (n 94) art. 7.
[110] TEU (n 93) art. 3(3).
[111] Krämer (n 95) 91.

obligation of Member States to ensure consistency with the concept of sustainable development, the principle of sincere cooperation mandates that Member States shall comply with sustainable development under Article 3(3) TFEU when taking actions within policy areas fully or partly harmonized by the EU.[112]

2.3.2 EU Policy

In comparison to the primary sources, documents from the EU institutions indicate slightly more on the scope and meaning of sustainable development, by outlining the priorities and objectives of the EU for the years ahead. Shortly after the concept of sustainable development was introduced into EU primary law by the Amsterdam Treaty, the EU Sustainable Development Strategy was launched in 2001.[113] In addition to quoting the Brundtland definition of sustainable development, the strategy established detailed objectives and actions for achieving sustainable development by aiming to reconcile economic growth, social cohesion, and environmental protection.[114]

In 2005, the European Commission adopted a Declaration on Guiding Principles for Sustainable Development.[115] The guidelines contain both the key sustainable development objectives for the EU, which reiterates the three-dimensional interpretation of the concept, and policy guiding principles on how to achieve the objectives.[116] Among the guiding principles, one can detect intra- and intergenerational equity, reflecting the Brundtland definition, and policy integration, reiterating the interconnected approach to the concept.[117]

Furthermore, in the Renewed EU Sustainable Development Strategy from 2006, the Council of the EU outlined a vision of sustainability wherein economic growth, social cohesion, and environmental protection are interconnected and reinforce one another.[118] In the concerned strategy, the main challenges to achieve sustainable development as well as proposed measures

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[112] van Hees (n 61) 64.
[113] Communication of the Commission, 'A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development' (15 May 2001) COM(2001)264 final.
[114] ibid.
[115] Communication of the Commission, 'Draft of Declaration on Guidelines for a Sustainable Development' (25 May 2005) COM(2005) 218 final.
[116] ibid.
[117] ibid 5.
[118] Council of the EU, 'EU's Renewed Strategy for Sustainable Development' (26 June 2006) 10917/2/06 REV 2.

to that effect are presented, [119] thus providing a somewhat deeper meaning to the concept. One of the challenges identified was the conservation and management of natural resources.[120] Among the proposed measures to address the challenge of conserving and managing natural resources was the designation of Natura 2000 sites and improved implementation of policies to its protection.[121]

In 2009, the Commission assessed the implementation of the Renewed EU Sustainable Development Strategy and concluded that unsustainable trends persisted, which *inter alia* concerned excessive demand for natural resources and a global decline in biodiversity.[122] Of relevance to this thesis, which focuses on sustainable development in times of crisis, is that the 2009 Commission Communication stressed that the measures taken to address the financial crisis of 2007–2008 and mitigate its social impacts had to be consistent with the EU's sustainability objectives.[123] The Commission further stressed in its Communication that the measures taken to rectify the financial crisis could be used as an opportunity to address ecological, economic, and social sustainability.[124] Arguably, this confirms the idea that the EU considers sustainable development to constitute three dimensions that are interconnected and mutually reinforceable, and that the objective of sustainable development shall not be undermined even in times of crisis.

More recent developments under EU policy are first the adoption and implementation of the UN SDGs and the European Response to the 2030 Agenda.[125] Secondly, as an integral part of implementing the UN SDGs, the European Green Deal was presented by the Commission in 2019, aiming at *inter alia* decoupling economic growth from resource use.[126] Thirdly, the first set of targets to be met by 2030 under the European Green Deal presented by the Commission

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[119] ibid.
[120] ibid 13.
[121] ibid.
[122] Communication of the Commission, 'Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development' (24 July 2009) COM(2009) 400 final.
[123] ibid 2.
[124] ibid.
[125] Communication of the Commission, 'Next steps for a sustainable European future European action for sustainability' (22 November 2016) COM(2016) 739 final.
[126] Communication of the Commission, 'The European Green Deal' (11 December 2019) COM(2019) 640 final.

was delivered in the policy package Fit For 55, containing interconnected proposals aimed particularly at achieving the EU's greenhouse gas emissions reduction target by 2030.[127]

Lastly, in response to Russia's invasion of Ukraine, the Commission introduced the REPowerEU Plan in 2022, aiming at rapidly reducing the dependence on Russian fossil fuels by diversifying energy sources and facilitate the clean energy transition in Europe.[128] According to the Commission, one of the main obstacles for achieving the objectives of the REPowerEU Plan is slow and complex permitting processes for renewable energy projects.[129] Therefore, the Commission proposed that renewable energy projects shall be presumed to be of an overriding public interests and introduced the concept of renewable go-to areas, to simplify and speed up the administrative procedures.[130] The proposals have now been incorporated in the updated Renewable Energy Directive,[131] which will be discussed in more detail in the following section.

2.3.3 EU Secondary Law

Both the EIA Directive and the Habitats Directive are based on Article 192(1) TFEU, thus forming part of the EU's environmental policy.[132] As components of the EU's environmental policy, these secondary acts should naturally aim to achieve the objectives and principles outlined in Article 191 TFEU. In addition, the Directives should strive to fulfill the broader objectives and principles of the EU, including sustainable development and the principle of integration[133] Accordingly, a discussion of how the two Directives aim to support the attainment of sustainable development is set out below.

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[127] Communication of the Commission, 'Fit for 55: delivering the EU's 2030 Climate Target on the way to climate neutrality' (14 July 2021) COM(2021) 550 final.
[128] Communication of the Commission, 'REPowerEU Plan' (18 May 2022) COM(2022) 230 final.
[129] ibid 11.
[130] ibid.
[131] Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 [2023] (Renewable Energy Directive).
[132] Langlet and Mahmoudi (n 53) 158 and 354.
[133] TEU (n 93) art. 3(3); TFEU (n 94) art. 11.

2.3.3.1 The EIA Directive

The EIA Directive mandates Member States to ensure that prior to authorizing a project which is likely to have a significant impact on the environment by virtue of its characteristics, development consent and an assessment on the potential environmental impacts of the project are required.[134] An EIA is carried out to identify and understand the potential environmental impacts of a planned project or activity, mitigate negative impacts on the environment, and inform the decision on whether or not to authorize the proposed project or activity.[135] The results from the EIA shall be duly taken into account before development consent is provided, but is not decisive for the decision.[136] Thus, the primary objective of an EIA is to integrate environmental concerns into planning and decision-making processes, thereby fostering sustainable development and implementing the principle of integration.[137]

The screening of which projects that requires an EIA is determined by the listing under the EIA Directive.[138] Projects listed under Annex I are always considered to have a significant environmental effect and thus subject to compulsory EIA, while Member States must determine whether projects listed under Annex II shall be made subject to an EIA through a case by case examination or by setting thresholds or criteria, or a combination of both methods.[139] However, in *exceptional cases*, where the application of the Directive's provisions would result in adversely affecting the purpose of the project, Member States may exempt certain projects from the requirement to carry out an EIA, according to Article 2(4) of the Directive.[140]

While the EIA Directive does not offer any definition of the term *exceptional cases,* the Commission has published a guidance document regarding application of exemptions under the

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[134] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L 26/1 (EIA Directive) art. 2(1).

[135] Kevin Hanna and Lauren Arnold, 'An introduction to environmental impact assessment' in Kevin Hanna (ed), *Routledge Handbook of Environmental Impact Assessment* (1st ed Routledge, 2022) 3.

[136] EIA Directive (n 134) art. 8.

[137] Judith Rosales, *Environmental Impact Assessment* (Delve Publishing 2021) 3; Owen McIntyre, 'The Principles of Integration and Interrelationships in International Law related to Sustainable Development: Sobering Lessons from EU Law' in Laura Westra, Prue Taylor, Agnès Michelot (eds), *Confronting Ecological and Economic Collapse: Ecological Integrity for Law, Policy and Human Rights* (Routledge 2013) 106.

[138] Langlet and Mahmoudi (n 53) 159.

[139] EIA Directive (n 134) arts. 4(1) and (2).

[140] ibid art. 2(4).

EIA Directive, including the exception under Article 2(4).[141] According to the Commission, the term *exceptional cases* should be understood narrowly and only apply to situations where it would be impossible to meet all the requirements under the EIA Directive without compromising the aim with the project in question.[142] In this regard, the Commission explains that this may involve a project that require approval and completion very quickly, leaving insufficient time to gather all the necessary environmental information as mandated by the Directive.[143]

As to what type of activities that may fall within the scope of the exemption clause under the EIA Directive, neither the Directive nor the Commission guidelines provides for clear categories of projects. However, the Commission clarifies that previous exemptions granted under Article 2(4) of the EIA Directive have typically concerned scenarios where the urgency of the project was so pronounced that failure to implement it would have been detrimental to the public interest, which could endanger political, administrative, or economic stability and security.[144] Furthermore, the CJEU has held that the need to ensure the security of electricity supply possibly constitute an *exceptional case* within the meaning of Article 2(4) EIA Directive.[145] Yet, the Court emphasized that if the derogation under Article 2(4) is invoked to ensure the security of electricity supply, the Member State concerned must still demonstrate that the alleged risk to security of supply is reasonably likely and that the urgency of the project is sufficiently compelling to justify not making an EIA.[146]

Apart from the exemption clause under Article 2(4) of the EIA Directive, the amended Renewable Energy Directive allows for the designation of renewable energy acceleration areas, or renewable go-to areas as referred to under the REPowerEU Plan.[147] In these areas the competent authorities of the Member States are called upon to designate areas specifically suitable for the deployment of one or several types of renewable energy sources, where the

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[141] Notice of the Commission, 'Guidance document regarding application of exemptions under the Environmental Impact Assessment Directive (Directive 2011/92/EU of the European Parliament and of the Council, as amended by Directive 2014/52/EU) – Articles 1(3), 2(4) and 2(5)' (14 November 2019) C 386/12.
[142] ibid para 3.5.
[143] ibid para 3.8.
[144] ibid para 3.7.
[145] Case C-411/17, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL* (2019) ECLI:EU:C:2019:622, para 97.
[146] ibid para 101.
[147] Renewable Energy Directive (n 131) art. 15(c); REPowerEU Plan (n 128) 11.

environmental impacts are not expected to be significant. Of relevance is the requirement to carry out an environmental assessment *a priori* to designating an area as a renewable acceleration area, which makes it possible to exempt project specific EIAs in these areas.[148] The requirement for an *a priori* environmental assessment can be considered to reflect the EU's commitment to sustainable development by facilitating renewable energy deployment while still aiming at safeguarding environmental protection.

2.3.3.2 The Habitats Directive

At the heart of the EU's biodiversity conservation policy is the network of nature conservation sites, also known as Natura 2000.[149] The Habitats Directive establishes the Natura 2000 network under Article 3(1) and provides that this network shall include sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II to the Directive.[150] Apart from the habitats and species listed under the Annexes to the Habitats Directive, the Natura 2000 network likewise encompass the special protection areas established under the Birds Directive.[151]

The overall objective with the Habitats Directive is to ensure biodiversity of natural habitats and wild fauna and flora on EU territory.[152] The rationale is that the objective shall be achieved by maintaining or restoring the habitats and species concerned at favorable conservation status, while simultaneously taking into account economic, social and cultural requirements and regional and local characteristics.[153] In the preamble it is underlined that the aim under Article 2 of the Habitats Directive promotes sustainable development, by emphasizing the need to strike a balance between the conservation of biodiversity on the one hand and human activities to meet other societal interests on the other.[154]

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[148] ibid art. 15(c)(2).
[149] Langlet and Mahmoudi (n 53) 350.
[150] Council Directive 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7 (Habitats Directive) art. 3(1).
[151] ibid; Directive 2009/147/EC of the European Parliament and of the Council of 30 November 200 on the conservation of wild birds [2009] OJ L 20/7 (Birds Directive) art. 4.
[152] Habitats Directive (n 150) art. 2(1).
[153] ibid arts. 2(2) and 2(3).
[154] ibid preamble, rectical 7.

The sites forming part of the Natura 2000 network are subject to the protection regime under Article 6(2) to 6(4) of the Habitats Directive.[155] The protection regime applies to the sites designated under both the Birds and the Habitats Directive.[156] According to the assessment framework under Article 6(3) of the Habitats Directive, 'any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objective.' In addition, the national authorities may only agree to the plan or project after having ascertained that it will not adversely affect the integrity of the site concerned. [157]

To determine whether an appropriate assessment of a plan or project is required, the CJEU has held, by reference to the precautionary principle, that an appropriate assessment is mandatory if it cannot be excluded, based on objective information, that the project or plan will have a significant effect on that site.[158] In the same ruling, the Court further emphasized that the national competent authority shall only authorize a project or plan where no reasonable scientific doubt remains as to the absence of adversely effects to the integrity of the site in question.[159] Moreover, the CJEU underlined in a separate ruling that a Member State had incorrectly transposed the Habitats Directive to national law by generally exempting certain projects carried out outside Natura 2000 sites from the impact assessment requirement under Article 6(3).[160] The Court has also confirmed that general exceptions in national law to the appropriate assessment of activities likely to have an effect on a Natura 2000 site fails to fulfil the obligations under Article 6(3) of the Habitats Directive.[161] As the appropriate assessment applies to projects both inside and outside Natura 2000 sites, and projects that might individually or jointly affect the integrity of the site in question, it can be ascertained that Article 6(3) of the Habitats Directive has a wide and stringent scope of application.[162]

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[155] An Cliquet, 'EU Nature Conservation Law: Fit for Purpose' in Marjan Peeter and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing Limited 2020) 271.
[156] Habitats Directive (n 150) arts. 4(5) and 7.
[157] Habitats Directive (n 150) art. 6(3).
[158] Case C-127/02, *Waddenvereniging and Vogelbeschermingsvereniging* (2004) ECLI:EU:C:2004:482, paras 43-45.
[159] ibid paras 58–59.
[160] Case C-98/03, *Commission v Germany* (2006) ECLI:EU:C:2006:3, paras 39-45.
[161] Case C-538/09, *Commission v Belgium* (2011) ECLI:EU:C:2011:349, para 66.
[162] Notice of the Commission, 'Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC' (21 November 2018) C(2018) 7621 final, 40-41.

Regardless of the strict requirements outlined above, Article 6(4) Habitats Directive provides that a project or plan, despite a negative assessment of the implications for the site, may nevertheless be authorized if it fulfills the requirements under the relevant provision. The prerequisites entails that it concerns a project or plan of *imperative reasons of overriding public interests*, including those of social or economic nature, alternative solutions are absent, and compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected[163] The derogation clause in question can therefore be considered a manifestation of the aims of sustainable development, as it strives to balance the environmental protection outlined under Article 6(3) of the Directive with other societal interests.[164] Furthermore, the CJEU has interpreted Article 6(4) in the light of sustainable development to conclude that a project that might have negative impacts on the Natura 2000 site in question may nevertheless be authorized.[165] The CJEU's rationale is based on the understanding that maintaining biodiversity sometimes necessitates supporting or regulating human activities.[166]

The CJEU has clearly stated that the derogation clause may only be invoked subsequent to the determination of implications for the site concerned in the appropriate assessment under Article 6(3).[167] This is because evaluating whether there exist *overriding reasons of public interest* and identifying less damaging alternatives necessitates a comparison with the harm inflicted on the site by the plan or project under consideration.[168] Additionally, considering that Article 6(4) constitute an exception to the authorization rules under Article 6(3), the CJEU has declared that the derogation clause shall be interpreted strictly.[169]

What constitute *imperative reasons of overriding public interests* within the meaning of Article 6(4) has been discussed to a great extent by both the Commission and the CJEU. First, it is apparent that it is irrelevant whether the project is carried out by a private or public body, instead the key aspect is whether the project serves a public interest.[170] Second, by referring to how the

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[163] Habitats Directive (n 150) art. 6(4).
[164] Stefan Möckel, 'The European ecological network "Natura 2000" and its derogation procedure to ensure compatibility with competing public interests' (2017) 23 Nature Conservation 87, 91.
[165] Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (2012) ECLI:EU:C:2012:560, paras 134–139.
[166] ibid.
[167] Case C-304/05, *Commission v Italy* (2007) ECLI:EU:C:2007:532, para 83.
[168] ibid.
[169] Case C-239/04, *Commission v Portugal* (2006) ECLI:EU:C:2006:665, para 35; Case C-182/10, *Solvay and Others* (2012) ECLI:EU:C:2012:82, para 73.
[170] Case C-182/10, *Solvay and Others* (n 169) para 75; Notice of the Commission (n 162) 55.

concept has been interpreted in other contexts, the Commission explains that the concept refers to situations where plans or projects are crucial for policies aimed at protecting values for citizens' lives (i.e., health, safety, and environment), policies fundamental for the state and the society, and projects carrying out activities that carries out specific obligations of public service.[171] An example where the CJEU has considered that the project in question constitutes an *imperative reason of overriding public interests* concerned the supply of drinking water.[172] Thirdly, the *imperative reason of overriding public interest* should be balanced against the harm caused to the Natura 2000 site as a result of authorizing the project under consideration, taking into account its conservation objectives and the relevance of the site for the species and habitats for which it is designated.[173]

Furthermore, the concept of *imperative reasons of overriding public interests* can be considered to have been further clarified by the amendment of the Renewable Energy Directive in 2023.[174] Since the amendment, the construction and operation of renewable energy sources are presumed to serve an overriding public interest when balancing legal interests in individual cases under, *inter alia*, Article 6(4) of the Habitats Directive.[175] This provision aims to streamline the permit procedure for renewable energy projects.[176] The Commission contends that accelerating and expanding renewable energy deployment can reduce reliance on Russian fossil fuels, advance the transition to cleaner energy, and bolster the resilience of European energy systems.[177] Consequently, one could argue that the EU considers renewable energy projects, despite their potential impact on Natura 2000 sites, as aligned with sustainable development, as they may qualify for derogation under Article 6(4) of the Habitats Directive, in accordance with the EU's overarching objective of sustainable development. It must, however, be emphasized that the element of overriding public interest is only one of three prerequisites for a possible exemption from the requirements under Article 6(4) Habitats Directive, the other two prerequisites must therefore also be met for a lawful derogation.

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[171] Guidance Document of the Commission, 'Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC' (January 2007) 8.
[172] Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (n 165) para 128.
[173] Notice of the Commission, 'Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC' (28 October 2021) C 437/1, para 3.3.2.
[174] Renewable Energy Directive (n 131).
[175] ibid art. 16f.
[176] REPowerEU Plan (n 128) 11.
[177] ibid 1.

One last aspect to consider is the relationship between the environmental assessments required under the EIA Directive and Article 6(3) of the Habitats Directive. This is because, although the appropriate assessment often is carried out together with the EIA, the scope and obligations arising from the procedures differ.[178] These differences refer firstly to the aspects that require assessment; while the Habitats Directive demands that the impacts on the Natura 2000 site's conservation objectives are established, the EIA Directive requires that a broader scope of factors is identified in terms of the impacts on the environment and human health.[179] The other difference is the fact that the EIA Directive only mandates that the results from the EIA are considered in the decision-making process, whereas Article 6(3) Habitats Directive dictates that the result from the appropriate assessment is decisive for authorization of the project or plan.[180] Lastly, while the EIA is applicable only to certain types of projects or plans listed in the Annexes to the Directive, the appropriate assessment under the Habitats Directive is applicable to all types of projects or plans in so far as it may have a significant effect on the environment in the Natura 2000 site.[181]

2.3.4 The Balance Between the Three Dimensions

Based on the foregoing, it is possible to distinguish how sustainable development is implemented at the EU level and how the EU aim to balance the three dimensions of the concept. Firstly, the principle of consistency ensures that all EU's policies and legal acts are compatible, or at the very least not contrary, with the objective of sustainable development. The second aspect is policy integration, ensuring that environmental concerns are considered when making decisions with primarily economic or social implications. The third element, which simultaneously functions as a tool to promote the implementation of policy integration at Member State level, is the obligation to carry out an EIA. By identifying and assessing potential environmental effects in the decision-making process, the EIA enables the balancing of economic and social interests with environmental protection.

These tools find practical application in the secondary legislation discussed earlier, and the balance between the different dimensions of sustainable development is particularly prominent

[178] See EIA Directive (n 134) art. 2(3).
[179] Habitats Directive (n 150) art. 6(3); EIA Directive (n 134) art. 3.
[180] Case C-418/04, *Commission v Ireland* (2007) ECLI:EU:C:2007:780, para 231.
[181] EIA Directive (n 134) arts. 4(1) and (2); Habitats Directive (n 150) art. 6(3).

when reviewing the derogation clauses of the Directives concerned. While Article 2(4) EIA Directive stipulates that certain plans or projects may be exempted from the requirement to carry out an EIA, Article 6(4) of the Habitats Directive mandates that a project or plan may be authorized despite a negative assessment of the implications for the Natura 2000 site in question. Apart from having different scopes of applications, the Directives also provide different words as to which projects or plans can be covered by the exemptions, i.e., *exceptional cases* and *imperative reason of overriding public interests.* Yet, it appears that both concepts traditionally have encompassed projects that provide basic human needs, such as the supply of drinking water or electricity, and more recently also cover renewable energy projects.[182]

From the type of economic or social interests recognized as falling within the scope of the exemption clauses under the relevant Directives, it can be argued that the EU has established stringent criteria for justifying the economic or social interests of a project if it has the potential to negatively impact the environment. Therefore, it is on the one hand possible to argue that sustainable development under EU law often weighs in favor of environmental protection. Yet, Advocate General Léger expressed in a separate opinion to the case *First Corporate Shipping*,[183] that sustainable development under EU law does not mandate that environmental protection always prevail over other societal interests.[184] Instead, a balance must be struck between the different interests.[185] Perceived in this way, sustainable development under EU law would seek to optimize each interest in a balanced manner.

However, the notion of achieving an equitable balance among the dimensions of sustainable development assumes that each dimension carries equal weight, which is not entirely accurate. This is because the environmental aspect necessitates integration into all other policy areas, unlike the economic and social dimensions. The greater weight of the ecological dimension can, however, be justified by Winter's argument that the ecological dimension of sustainable development forms the basis of the concept, vital to sustain the other dimensions.[186] In addition

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[182] See Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (n 165) para 128; Case C-411/17, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL* (n 145) para 97; Renewable Energy Directive (n 131) art. 16f.
[183] Case C-371/98, *First Corporate Shipping* (2000) ECLI:EU:C:2000:600.
[184] Case C-371/98, *First Corporate Shipping* (2000) ECLI:EU:C:2000:108 Opinion of Advocate General Léger, para 54.
[185] ibid.
[186] Winter (n 82) 27.

to this, Krämer argues that the environment is an interest without an interest group, lacking monetary or social value to enforce the environmental dimension, unlike the other two dimensions.[187] Hence, it can be argued that the environmental dimension merits more attention if any form of balance among the different dimensions of sustainable development is to be achieved.

Thus, it can be ascertained that the essence of sustainable development and the balance between the different elements of the concept primarily is reflected in the derogation clauses embedded in the Directives concerned. Both the EIA Directive and the Habitats Directive maintain strict criteria with the aim of protecting the environment, thus sustaining the ecological dimension of sustainable development. Yet, there is a possibility to exempt certain of these requirements if there is a legitimate reason according to the Directives to do so, which may be reasons stemming from the economic or social dimensions of the concept. Hence, EU law endeavors to uphold a robust level of environmental protection while underscoring the significance of striking a balance among divergent interests to attain the objectives of sustainable development.

[187] Krämer (n 95) 95.

3 The Current Swedish Environmental Permit Procedure and the Proposal to Fast Track the Process

3.1 Introduction

In this chapter, the key legislative proposals in SOU 2023:11 regarding temporary environmental permits for essential activities for increased security of supply will be presented and discussed. First, to understand why the Swedish Government deemed it necessary to appoint an investigation into how Swedish environmental legislation could be amended to increase Sweden's supply readiness, brief facts about the Swedish legal framework as it currently stands on the matter will be presented. This includes a concise presentation on the rules governing the permit procedure for environmental permits, criticism against the current legal framework, and a discussion regarding a relevant case.

Secondly, the key legislative proposals in SOU 2023:11 will be presented. For clarification, an SOU is a report produced by a special committee appointed to investigate a particular issue, before the Government presents a bill.[188] Thus, even if the word 'legislative proposal' is used in this part of the thesis, it does not refer to legislative proposals from the Government, but to the proposals put forward by SOU 2023:11 on how the Swedish Environmental Code could be amended.

3.2 Legal Background

It should be emphasized that the types of activities relevant for this thesis, i.e., environmentally hazardous activities, water activities, as well as activities that may affect a Natura 2000 site, are regulated not only under the Swedish Environmental Code but also by other laws and regulations.[189] However, the Environmental Code can be characterized as the central instrument of Swedish environmental legislation,[190] and the environmental permit procedure is primarily

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[188] Regeringskansliet, 'Statens offentliga utredningar' (*Regeringskansliet*) <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/> accessed 7 May 2024.
[189] See for example: Plan- och bygglag (2010:900) (entered into force 1 July 2010); Lag (1999:381) om åtgärder för att förebygga och begränsa följderna av allvarliga kemikalieolyckor (entered into force 27 May 1999); Lag (1998:812) med särskilda bestämmelser om vattenverksamhet (entered into force 11 June 1998); Förordning (1998:1252) om områdesskydd enligt miljöbalken m.m. (entered into force 3 September 1998).
[190] Jonas Ebbesson, *Miljörätt* (5th edn, Iustus 2023) 54.

regulated by the Environmental Code.[191] Thus, the forthcoming description of the Swedish permit system will be delimited to the rules under the Environmental Code.

3.2.1 The Current Environmental Permit Procedure under the Swedish Environmental Code

At the heart of Sweden's environmental legislation is the Swedish Environmental Code.[192] Consisting of over 30 chapters, the Environmental Code covers a variety of cross-cutting legal issues and different areas of law. However, it is explicitly stated in the portal paragraph of the Code that the purpose of all provisions under the Code is to promote sustainable development.[193] The relevant provision makes it clear that the Code shall be applied in such a way as to achieve several intermediate objectives of sustainable development, which includes goals of both social, economic, and environmental character.[194]

The requirement to carry a permit applies for several types of activities that may cause disturbance to the environment or utilizes natural resources.[195] Projects subject to the permit requirement include environmentally hazardous activities, water activities, and activities that may affect a Natura 2000 site.[196] Considering that the objective of Swedish environmental legislation is sustainable development, the same objective is intended to have a guiding influence in permit procedures.[197] Yet, Michanek and Zetterberg argue that it remains ambiguous how the objective of sustainable development is reflected in the permit procedure, as the application of the permit rules generally rely on other provisions of the Code.[198]

However, it is vital to emphasize that the Environmental Code is not fundamentally designed to prohibit every activity that might be harmful for the environment, but rather to minimize the environmental impacts of activities through *inter alia* the permit and inspection procedures.[199] In this way, the Environmental Code in general, and the permit procedure regulated under the

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[191] Darpö describes this aspect indirectly in: Jan Darpö, *Eftertanke och förutseende: En rättsvetenskaplig studie om ansvar och skyldigheter kring förorenade områden* (Uppsala University 2001) 76.
[192] Swedish Environmental Code (1998:808) [Miljöbalk (1998:808)] (entered into force 11 June 1998) (SEC); Ebbesson (n 188) 54.
[193] SEC (n 192) chapter 1 para 1.
[194] ibid.
[195] Ebbesson (n 190) 63.
[196] SEC (n 192) chapter 7 para 28a, chapter 9 and chapter 11.
[197] Ebbesson (n 190) 74.
[198] Gabriel Michanek and Charlotta Zetterberg, *Den Svenska Miljörätten* (5th edn, Iustus 2021) 102.
[199] Prop. 1997/98:45, 'Miljöbalk del 1' (4 December 1997) 170.

Code in particular, can be considered a tool for implementing the ecological dimension of sustainable development.[200] Furthermore, the requirement for an environmental assessment prior to the granting of a permit arguably reflects the objective of sustainable development in the permit procedure. This is because the objective of an environmental assessment, according to the Environmental Code, is to integrate environmental aspects into planning and decision-making, to promote sustainable development.[201]

The Swedish rules regulating environmental assessments can be found under Chapter 6 of the Environmental Code and are to a large extent developed to implement the provisions under the EIA Directive.[202] According to Chapter 6 Paragraph 20 of the Environmental Code, a specific environmental assessment must be carried out when an activity or measure is to undergo a permit procedure for a permit under Chapter 7 Paragraph 28a (Natura 2000), Chapter 9 (environmental hazardous activity), or Chapter 11 (water activity). The environmental assessment shall precede the permit decision.[203] Additionally, carrying out an environmental assessment is a process requirement, rather than a substantive obligation, akin to the provisions outlined in the EIA Directive.[204] Chapter 6, Paragraph 35 of the Environmental Code clarifies the information an EIA shall contain. Concerning the appropriate assessment for Natura 2000 sites, the content in such an assessment differs slightly from an EIA, as it must consider the specific conservation objectives for the Natura 2000 site concerned.[205]

Furthermore, the permit procedure and the authority assessing an environmental permit is primarily a national matter. However, in those policy areas where there are binding EU rules in place, the Member States still enjoy procedural autonomy, which means that it is up to the national legal system in each Member State to determine the procedural conditions for how EU law is to be complied with at national level.[206] In Sweden, permit applications are, as a general

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[200] ibid 156.
[201] SEC (n 192) chapter 6 para 1 section 1.
[202] SEC (n 192) chapter 6; Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L 26/1 (EIA Directive); Ebbesson (n 190) 97.
[203] Ebbesson (n 190) 97.
[204] Supreme Court [Högsta Domstolen] case no T 3126-07 (NJA 2009 sid 321) (10 June 2009).
[205] SEC (n 192) chapter 6 para 36; For more information on the difference between the content for the two assessments see Mikael Schultz and Åsa Marklund Andersson, *Artskydd* (2nd edn, Wolters Kluwer 2023) 90.
[206] Case 33-76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* (1976) ECLI:EU:C:1976:188, para 5; Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (6th edn, OUP 2015) 226–227.

rule, handled by the County Administrative Board or the Land and Environmental Courts.[207] What characterizes the procedures at both the Land and Environmental Courts and the County Administrative Board is that cases are typically examined not only by lawyers and judges, but also by people with scientific or technical competence relevant for the case in question.[208] This approach ensures that the reviewing authority is equipped with comprehensive legal, technical, and scientific knowledge to adjudicate the matter.[209]

In some cases, however, the Government can exercise decisive influence on the pre-assessment of an activity through a Government admissibility assessment [regeringens tillåtlighetsprövning], in line with Chapter 17 of the Environmental Code.[210] The Government admissibility assessment is generally applicable for large projects important for the development of the society while posing risks to human health, the environment, or the management of natural resources.[211] The assessment relates to the localization of the activity and whether the activity as a whole should be permitted.[212] The aim is to affect the subsequent permit assessment, which is handled by the ordinary permit authority.[213] The presumption is that the Government's admissibility decision is made binding for the subsequent permit assessment of the same activity.[214] However, the Swedish Supreme Court have clarified that if the Government's decision relates to a Natura 2000 site and no overall assessment of the site has been made by the Government, that assessment shall be made by the ordinary permit authority, while taking case law from the CJEU into account.[215] Thus, the Government's decision on admissibility has legal force for the lower instance insofar as it constitutes a basis for the assessment of a permit application, and a comprehensive assessment has been made, ensuring that the decision is in line with Sweden's obligations under EU law.[216]

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[207] Jan Darpö, 'EU-rätten och den processuella autonomin på miljöområdet – Om det svenska systemet med tillåtlighetsförklaringar och mötet med europarätten' (2012) 2 Nordic Environmental Law Journal 5; SEC (n 192) chapter 7 para 29b, chapter 9 para 8, chapter 11 para 9b.
[208] Michanek and Zetterberg (n 198) 418.
[209] Ebbesson (n 190) 66.
[210] SEC (n 192) chapter 17.
[211] ibid chapter 17 paras 1–3; Michanek and Zetterberg (n 198) 460.
[212] Michanek and Zetterberg (n 198) 462.
[213] Ebbesson (n 190) 128.
[214] ibid.
[215] Supreme Court [Högsta Domstolen] case no T 3158-12 (NJA 2013 s. 613) (18 June 2013).
[216] Jan Darpö, 'Bunge-täkten i Högsta domstolen' (2013) Miljöaktuellt 2.

The Government must observe the existing legal rules on the matter in its admissibility assessment, meaning that the applicable law remains largely unchanged whether it concerns an admissibility assessment by the Government or a permit assessment by the County Administrative Board and Land and Environmental Courts.[217] Instead, the primary difference lies in the involvement of politically accountable individuals in the Government's review process.[218] Hence, it provides an opportunity for political control over decisions on projects of essential public interest which also have a significant environmental impact.

3.2.2 The Case of Cementa AB

The case involving the company Cementa AB is repeatedly cited in SOU 2023:11 to support the necessity of a legislative amendment.[219] The occurrence in question was initiated by the permit application for continued mining operations and water diversion to extract limestone for the cement production on the island Gotland in Sweden, submitted by Cementa in 2017.[220] Cementa requested that the Land and Environmental Court grant a permit pursuant to Chapters 9, 11, and 7 Paragraph 28a of the Swedish Environmental Code, i.e., environmentally hazardous activity, water activity, and activity that might affect the environment in a Natura 2000 site.[221] Regardless of the fact that Cementa was granted the requested permits by the court of first instance, the Land and Environmental Court of Appeal found that the EIA carried out by Cementa was so deficient that it constituted a procedural obstacle; therefore overturning the decision of the permit application made by the Land and Environment Court.[222] Despite being appealed, the Supreme Court did not grant leave to appeal, which meant that the Land and Environmental Court of Appeal's decision was upheld.[223]

However, the Swedish Government argued that if Cementa was not granted a new permit for its project on Gotland, this would lead to an acute shortage of cement, thereby causing significant socio-economic consequences for Sweden.[224] Therefore, in September of 2021, all

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[217] Michanek and Zetterberg (n 198) 460.
[218] ibid.
[219] SOU 2023:11, 'Tillfälligt miljötillstånd för samhällsviktig verksamhet – för ökad försörjningsberedskap' (24 February 2023) see for example pages 29, 30, 56, and 91.
[220] Cementa AB, 'Permit Application' [Tillståndsansökan] (28 December 2017).
[221] ibid paras A.1 – A.3.
[222] Land and Environment Court [Mark- och miljödomstolen] case no M 7575-17 (17 January 2020) 2-3; Land and Environment Court of Appeal [Mark- och miljööverdomstolen] case no M 1579-20 (6 July 2021) 41.
[223] Supreme Court [Högsta Domstolen] case no T 4746-21 (25 August 2021).
[224] Prop. 2021/22:15, 'Regeringsprövning av kalkstenstäkter i undantagsfall' (21 September 2021) 22.

political parties in the Swedish Parliament passed a new provisional chapter within the Swedish Environmental Code.[225] This chapter created a possibility for the Government to examine applications for time-limited permits for limestone quarrying activities. Such permits could be sought for projects necessary to meet essential public interests, where the need for limestone could not be satisfied in another satisfactory manner from a public perspective. The provisional chapter applied only to limestone quarrying covered by an existing permit at the time of application that could not be completed due to a time limitation in that permit.[226] On the basis of the provisional chapter, the Swedish government was able, at the end of 2021, to grant Cementa AB a temporary permit to continue its mining activities on Gotland until the end of 2022.[227]

In addition, the Government decided to exempt the activities in question of Cementa AB from the environmental assessment requirements under Chapter 6 of the Swedish Environmental Code.[228] This was possible as the provisional chapter under the code implemented the exemption clause under Article 2(4) of the EIA Directive.[229] The Government considered that a lack of production at Cementa's plant in Slite Gotland could have considerable consequences for housing construction, the maintenance and construction of infrastructure as well as for the labor market and the Swedish economy.[230] It was further held that there was no other satisfactory alternative at the time.[231] The Government argued that the permit assessment was urgent and therefore concluded that a full application of the provisions on environmental assessment under Chapter 6 of the Environmental Code would have a significant negative impact on the purpose of the activity.[232] Moreover, the Swedish Government notified the

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[225] Miljö- och jordbruksutskottets betänkande, 'Regeringsprövning av kalkstenstäkter i undantagsfall' doc no. 2021/22:MJU7 (28 September 2021).
[226] ibid.
[227] Regeringsbeslut, 'Ansökan om tillstånd enligt miljöbalken till täkt av kalksten i Slite, Gotlands kommun' doc no M2021/01774 (18 November 2021).
[228] Regeringsbeslut, 'Ansökan om tillstånd enligt miljöbalken till täkt av kalksten i Slite, Gotlands kommun; nu fråga om undantag från krav på miljöbedömning' doc no M2021/01774 (delvis) (3 November 2021).
[229] Prop. 2021/22:15 (n 222) 7; SEC (n 190) chapter 17 para 3.
[230] Regeringsbeslut, 'Ansökan om tillstånd enligt miljöbalken till täkt av kalksten i Slite, Gotlands kommun; nu fråga om undantag från krav på miljöbedömning' (n 226) 4.
[231] ibid 5.
[232] ibid 6.

Commission of the application of the derogation clause, in line with the requirement under Article 2(4) of the EIA Directive.[233]

The relevant case led to an intense debate on the effectiveness of the permit procedure under the Environmental Code, especially in relation to other societal interests.[234] Likewise, SOU 2023:11 cites the Cementa case as an argument to illustrate that the current permit procedure risks causing delays for essential public projects.[235] Yet, it may be argued that it was the inadequate EIA that led to a lengthy permit process, rather than a too strict or rigid legal framework.

3.2.3 The Debate Concerning the Current Permit Procedure

Although the Cementa case, among several cases, led to an intense debate on the effectiveness of the Swedish permitting procedure, the issue has been on the agenda for several decades.[236] Among all that has been written about the Swedish procedure for environmental permits, it is possible to distinguish a few primary arguments from the debate as to why the current permit procedure is ineffective and inappropriate. Considering that these arguments are largely used as justification for the legislative proposals in SOU 2023:11, these claims will be presented and discussed in this section.

The first argument that can be distinguished is that the permit procedure for environmental permits is lengthy and complex.[237] Svenskt Näringsliv (the Confederation of Swedish Enterprise), among others, point out that the permit process often involves delays, which in turn leads to investments being postponed or not taking place.[238] In SOU 2023:11, the case of Cementa AB is used as an example of when the permit procedure risks causing delays for

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[233] Regeringskansliet, 'Information enligt artikel 2.4 i Europarlamentets och rådets direktiv 2011/92/EU av den 13 december 2011 om bedömning av inverkan på miljön av vissa offentliga och privata projekt' doc no. M2021/01774 (3 November 2021).
[234] Maria Pettersson and Patrik Söderholm, 'Cementas tillståndsprocess: en studie av ändamålsenligheten i tillståndsprövningen av Cementas verksamhet på Gotland' (Myndigheten för tillväxtpolitiska utvärderingar och analyser) PM 2022:01 (January 2022) 8.
[235] SOU 2023:11 (n 219) 29.
[236] See for example: SOU 2003:124, 'En effektivare miljöprövning' (Miljöbalkskommitténs delbetänkande) (1 December 2003) 20.
[237] Svenskt Näringsliv, '50 miljarder och företag som försvann - Resultatet av krångliga och oförutsebara miljötillståndsprocesser' (November 2021) 5; SweMin, 'Svemins reformpaket för effektiva tillståndsprocesser' (October 2021) 7; Lotta Engzell-Larsson, 'Miljöbalken ett sänke för svenska bolag' Dagens Industri (13 October 2021) <https://www.di.se/ledare/miljobalken-ett-sanke-for-svenska-bolag/> accessed 25 March 2024.
[238] Svenskt Näringsliv (n 237) 9.

essential public actors who, under extraordinary circumstances, require a swift permit process to be able to deliver a public important product or service.[239]

What is intriguing about this argument is the omission of specifying the meaning of a delay and the reasons behind these delays. There is a general recognition amongst stakeholders that a processing time of 1 year, from the submission of the permit application to the granting of the permit, is reasonable.[240] According to a report conducted by the Swedish Environmental Protection Agency, the median time for a permit application in 2022 was approximately 1–1.5 years depending on the type of activity and the authority processing the permit application.[241] Therefore, based on this statistic, it appears that the duration of a permit process typically aligns with what is deemed a reasonable timeframe. Furthermore, it is repeatedly claimed that the lengthy permit procedures are attributable to the current legal framework.[242] Even in SOU 2023:11, the current permit rules are considered responsible for that Cementa had a lengthy permit process.[243] However, Darpö and Ebbesson argue that certain permit processes take longer due to insufficient applications and EIAs, rather than an overly rigid legal framework.[244]

The second argument upheld by several actors is that the current permit procedure is counterproductive for sustainable development.[245] The business sector alleges that the current legislation and legal practice is focusing on conservation rather than sustainable development.[246] Accordingly, it is argued that economic and social factors should be given greater consideration in the permit procedure, to promote the overarching objective of sustainable development.[247] In this regard, it is furthermore suggested that the exemption provisions under the EU nature conservation framework should be used more widely, to balance

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[239] SOU 2023:11 (n 219) 29.
[240] SOU 2022:33, 'Om prövning och omprövning – en del av den gröna omställningen' (14 June 2022) 94.
[241] Naturvårdsverket, 'Uppdrag att analysera statistik för miljötillståndsprövningen under 2022: Redovisning av regeringsuppdrag KN2023/03355' (15 June 2023) NV-10889-22, 4.
[242] Svenskt Näringsliv (n 237) 5.
[243] SOU 2023:11 (n 219) 29.
[244] Jonas Ebbesson and Jan Darpö, 'Slutreplik: Näringslivet verkar tro att miljölagar och tillståndsprocesser bara är formalia' *Altinget* (8 June 2023) <https://www.altinget.se/artikel/slutreplik-naringslivet-verkar-tro-att-miljolagar-och-tillstaandsprocesser-bara-ar-formalia> accessed 25 March 2024.
[245] SOU 2003:124 (n 236) 20; SweMin (n 237) 5.
[246] Nicklas Skår, 'Replik: Även professorer bör hålla sig till fakta gällande miljöbalken' *Altinget* (1 June 2023) <https://www.altinget.se/artikel/replik-aven-professorer-bor-haalla-sig-till-fakta-gallande-miljobalken> accessed 25 March 2024.
[247] SweMin (n 237) 8.

nature conservation against other societal interests.[248] In SOU 2023:11 it is explained that the implementation of the exemption clause under the EIA Directive would enable a shorter permitting process for essential activities needed to meet important public interests.[249]

However, it is counterargued by Darpö and Ebbesson that the permit procedure in Swedish legislation is designed to limit the harmful effects of environmentally hazardous activities with the aim to promote sustainable development.[250] Additionally, the preparatory work to the Environmental Code clearly states that it is *ecological* sustainable development that is envisaged in the portal provision to the Code.[251] Thus, it is a correct assumption made by the business sector that the permit procedure is not primarily intended to satisfy, for example, economic growth, but rather ensuring that social and economic activities are ecologically sustainable.[252] However, the rationale is that ecological sustainable development forms a sound basis for the growth of the other dimensions of the concept,[253] in line with Winter's argument of how the three dimensions of sustainable development shall be interpreted.[254]

The third argument, primarily focusing on the legislative proposals in SOU 2023:11, highlights the view that giving the Government legal authority to evaluate permit applications and waiving the need for an EIA would increase legal certainty; thereby counteracting the situation that arose with Cementa AB.[255] Concerning the provisional chapter introduced under the Swedish Environmental Code in the Cementa case, the Swedish Council on Legislation considered the law to be contrary to the requirement of general application, as it was evident that the provisional chapter was tailored specifically to grant Cementa AB a permit.[256] In contrast to the

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[248] SweMin (n 237) 8.
[249] SOU 2023:11 (n 219) 92.
[250] Ebbesson and Darpö (n 244).
[251] Prop. 1997/98:45 (n 199) 154.
[252] SOU 2022:33 (n 240) 106.
[253] ibid.
[254] See section 2.1.4; Gerd Winter, 'A Fundament and Two Pillars: The Concept of Sustainable Development 20 Years after the Brundtland Report' in Hans Cristian Bugge and Christina Voigt (eds), *Sustainable Development in International and National Law* (Europa Law Publishing 2008) 27.
[255] SOU (n 219) 56; Pia Pehrson, Johanna Lenell, and Johan Claesson Laakso, 'Förslag om tillfälliga miljötillstånd under exceptionella omständigheter' (*Foyen*, 20 April 2023) <https://www.foyen.se/aktuellt/forslag-om-tillfalliga-miljotillstand-under-exceptionella-omstandigheter/> accessed 25 March 2024.
[256] Prop. 2021/22:15 (n 224) 74–75.

temporary law, investigator Pär Malmberg argues that the law proposals in SOU 2023:11 would be both permanent and general.[257]

In essence, the debate on the Swedish permit procedure for environmental permits highlights the difficulties of balancing environmental protection with other economic and social interests, with the aim of promoting sustainable development. The different perspectives presented highlight the complexity of policy making in this area and the challenges of reaching consensus on the most effective regulatory approach. Given that several of the arguments discussed above are referred to as a justification for the legislative proposals in SOU 2023:11, it is relevant to examine the legislative proposals in the report.

3.3 The Proposal to Fast Track the Environmental Permit Procedure

In the following section, the legislative proposals in SOU 2023:11 will be presented and discussed. In this respect, the two main legislative proposals will be discussed, i.e., the possibility for the Government to review applications of environmental permits for essential public activities and to decide on exemptions from environmental assessment requirements. Hence, other parts of the proposal, which mainly concern procedural or technical criteria for undergoing a government review, will not be discussed in detail as this fall outside the scope of this thesis.

3.3.1 The Possibility for the Government to Review Environmental Permit Applications for Essential Public Activities

One of the two primary legislative proposals in SOU 2023:11 concerns the Government's ability to review permit applications and reads as follows:

> A possibility shall be introduced for the Government to review applications for temporary permits under Chapter 7 Paragraph 28a, Chapter 9 and Chapter 11 of the Swedish Environmental Code. The application must relate to activities that are essential to society and that are needed to satisfy essential public interests. There must also be a risk of serious social consequences if the need is not met, and the need must not be able to be met in another satisfactory manner from a public point of view.[258]

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[257] Johanna Alskog, 'Utredare föreslår en permanent lex Cementa' *Altinget* (7 March 2023) <https://www.altinget.se/miljo/artikel/utredare-foreslaar-en-permanent-lex-cementa> accessed 25 March 2024.
[258] SOU 2023:11 (n 219) 55 [own translation].

The wording of the proposal closely resembles the provisional chapter of the Environmental Code adopted in the Cementa case.[259] However, the proposed law encompasses all categories of activities and is thus not limited to cement production. In contrast to the provisional chapter that only applied for activities that was covered by an existing permit at the time of the application,[260] it is proposed that the Government's possibility to review permits under SOU 2023:11 shall not be limited to ongoing activities or those that have been previously reviewed.[261] The report recognizes the challenges for the Government in reviewing a permit application for an activity or project not previously examined, but concludes that it is crucial that the provision is not restricted to ongoing activities as there may arise exceptional situations where new activities need to be rapidly established.[262]

One aspect of the proposal to consider is what the concept of review [pröva] implies within the meaning of the report. The Government's admissibility assessment under Chapter 17 of the Environmental Code does not entail that the Government reviews the permit application *per se*, but merely the admissibility of the activity, while the permit application itself is examined by the ordinary instance hierarchy.[263] The proposal in SOU 2023:11 thus constitutes an exception to the ordinary instance hierarchy, as the wording of the proposal indicates that it is the Government that will be the authority making the permit decision.[264] Therefore, the concept of review within the meaning of the proposal seems to entail that the Government shall be able to make permit decisions akin to the permit decision taken in the Cementa case.[265]

Another essential element of the proposal is that it shall only be applicable in exceptional cases.[266] It is made clear in SOU 2023:11 that operators should not be able to count on having their activities reviewed by the Government and thus benefit from a swifter permit procedure, but rather that the provision shall be limited to activities that meet all the prerequisites of the provision,[267] which will be discussed more in detail below. In line with this, it is proposed that

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[259] Cf. Prop. 2021/22:15 (n 224) 5–7.
[260] ibid.
[261] SOU 2023:11 (n 219) 69; Cf. Prop. 2021/22:15 (n 224) 5–7.
[262] SOU 2023:11 (n 219) 68.
[263] Ebbesson (n 190) 71.
[264] SOU 2023:11 (n 219) 56.
[265] Regeringsbeslut, 'Ansökan om tillstånd enligt miljöbalken till täkt av kalksten i Slite, Gotlands kommun' (n 227).
[266] SOU 2023:11 (n 219) 56.
[267] ibid.

the Government shall enjoy broad discretion as to which projects or activities it reviews with support of the proposed law, thus taking into account political and socio-economic aspects of the necessity for the activity or project in question to be subject to a rapid permit process.[268] It is noteworthy that the Government is to enjoy such wide discretion in the assessment, as this most likely will lead to less predictability and legal certainty for operators.

Furthermore, the proposal stipulates that a permit granted under the proposed law shall be time limited, with a maximum time limit of 5 years.[269] In SOU 2023:11 it is argued that because the proposed law is an exception to the ordinary permit procedure, the permit should not be valid for longer than absolutely necessary, i.e. when the need can be met in another satisfactory way or within the time the activity should have had the time to be subject to the ordinary permit procedure.[270] This is of particular relevance in situations where the Government has also chosen to exempt the activity in question from the requirement of an environmental assessment.

However, in the report a possibility to extend the time limit for a permit granted by the Government under the concerned provision is proposed, with an extension up to two years.[271] The possibility of an extension should only be possible if all the prerequisites for a temporary permit persists, i.e., that the activity is essential to society and is needed to meet essential public interests, that there is a risk of serious consequences for society if the need is not met, and that the need cannot be met in an otherwise satisfactory manner from a public point of view.[272] As these prerequisites are a condition both for the granting and time extension of a permit, each prerequisite will be discussed in more detail below.

3.3.1.1 Essential Public Activity

The first prerequisite is that the activity must stipulate an essential public activity [samhällsviktig verksamhet].[273] The concept in question is defined under Swedish law as an activity, service, or infrastructure that maintains or ensures societal functions necessary for the

[268] ibid 57.
[269] ibid 65.
[270] ibid.
[271] ibid 76.
[272] ibid 77.
[273] ibid 57.

basic needs, values, or security of society.[274] Yet, neither SOU 2023:11 nor the relevant definition includes any examples on the types of activities this may concern.

However, the Swedish Civil Contingencies Agency has produced a guidance document on what activities that may classify as essential to society.[275] Accordingly, essential public activities encompass activities that serve the maintenance and manufacture of such raw materials and products necessary for, *inter alia*, health care, infrastructure, and energy supply.[276] What appears pertinent within the concept concerned is that the activity should contribute to enhancing the functionality and resilience of society in times of crises.[277]

3.3.1.2 Essential Public Interest

Secondly, in the proposal it is explained that the Government review would only apply to activities that are necessary to meet essential public interests [väsentliga allmäna intressen].[278] According to the reasoning in SOU 2023:11, essential public interests include interests of particular importance for the development of society, or regional and employment policy interests.[279] It is further clarified that it is the essential function, and the risks in the absence of the essential function, that would trigger a government review.[280] Thus, the assessment is completely independent of the type of activity or interest being assessed and instead focuses entirely on the function that the activity maintains or ensures.[281]

3.3.1.3 Risk of Serious Social Consequences

To further clarify the concept of essential public interests, it is stipulated in SOU 2023:11 that the failure to meet these needs must entail a risk of serious social consequences [risk för allvarliga samhällskonsekvenser].[282] This involves, according to the proposal, significant

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[274] Förordning (2022:524) om statliga myndigheters beredskap (entered into force 19 May 2022) para 6 section 2.
[275] Myndigheten för samhällsskydd och beredskap (MSB), *Lista med viktiga samhällsfunktioner – Utgångspunkt för att stärka samhällets beredskap* (MSB 2021).
[276] ibid 11–21.
[277] Myndigheten för samhällsskydd och beredskap (MSB), *Metod för identifiering av samhällsviktig verksamhet* (MSB 2023) 9.
[278] SOU 2023:11 (n 219) 61.
[279] ibid.
[280] ibid 62.
[281] ibid.
[282] ibid.

disruption, or an imminent risk of significant disruption to essential public activities.[283] In this regard, examples are listed in SOU 2023:11 of what the impacts may concern, which according to the report include housing construction, maintenance, infrastructure construction, energy supply, military defense capabilities, labor market, and the economy.[284]

Further, it is suggested in the proposal that serious social consequences occur if the need for the good or service is of national importance.[285] Hence, this suggests that the interest may not only be at local or regional level. However, the proposal clarifies that, if it concerns serious consequences at local or regional level, such an interest must be of national concern.[286] Nevertheless, a detailed explanation of what this entails is not provided.

3.3.1.4 No Satisfactory Alternatives

The fourth prerequisite implies that the Government review shall be limited to when the need to satisfy the essential public interest cannot be met in any other way that is satisfactory from the public point of view.[287] This assessment shall, according to the proposal, consider the magnitude of the need for the good or service, whether the good or service can be satisfied by other activities, or by imports from other countries.[288] It is thus made clear in the proposal that this assessment is mainly of political nature.

It is further suggested in SOU 2023:11 that the proposal should not apply to situations where it is possible in time for an activity to apply for a permit through the ordinary permit procedure.[289] Given that there are currently such divided opinions about how long a permit process in Sweden takes,[290] it appears to be difficult to assess whether the activity in question would have time to apply for a permit according to the ordinary permit procedure. It is further proposed that the assessment of the applicability of the proposed law should not take into account whether the operator has caused or contributed to the situation that has arisen through negligence, for

[283] ibid 62.
[284] ibid.
[285] ibid.
[286] ibid 62.
[287] ibid 63.
[288] ibid.
[289] ibid.
[290] See section 3.1.3.

example by not applying for a permit in sufficient time.[291] On the one hand, it is possible to understand the logic in this reasoning considering that the Government review is optional. On the other hand, there is a risk that some operators recognize their societal significance, and thus act negligently, with the expectation that their activities can undergo a government review in line with the proposal.

3.3.2 The Possibility for the Government to Decide on Exemptions from Environmental Assessment Requirements

The second key legislative proposal in SOU 2023:11 concerns the possibility for the Government to decide on exemptions from the environmental assessment requirements in certain cases which read as follows:

> A possibility is to be introduced for the Government to issue a special decision in individual cases whereby an activity reviewed in accordance with the proposed chapter may be exempted from the Environmental Code's requirement for a specific environmental assessment or minor environmental impact assessment, if
> 1. the application of these provisions would have a significant negative impact on the purpose of the activity and
> 2. an assessment of the environmental impact of the activity can be carried out anyway.
>
> The decision shall state the reasons for the decision.
> If the Government decides that exceptions may be made, the Government shall before examining the issue of a permit
> 1. make the exemption decision, together with the reasons for it, available to the public concerned,
> 2. examine whether any other form of assessment is appropriate,
> 3. ensure that the documentation submitted is made available to the public likely to be affected, and
> 4. inform the European Commission of the reasons for the exemption and attach the evidence submitted under paragraph 3.[292]

This part of the proposal is thus intended to transpose the exemption clause under the EIA Directive into Swedish law.[293] The exemption concerned was implemented in the provisional chapter and subsequently applied in the Cementa case discussed above.[294] Given that the

[291] ibid.
[292] SOU 2023:11 (n 219) 89 [own translation].
[293] Cf. EIA Directive (n 202) art. 2(4).
[294] Regeringsbeslut, 'Ansökan om tillstånd enligt miljöbalken till täkt av kalksten i Slite, Gotlands kommun; nu fråga om undantag från krav på miljöbedömning' (n 228); Prop. 2021/22:15 (n 224) 7.

provisional chapter is no longer in force, the report argues that a permanent and more general exemption from the environmental assessment requirements needs to be introduced.[295] This is justified by the fact that in cases where all the prerequisites for a Government review, as described above, are met, a more rapid permit process may be required for an essential public activity required to meet essential public interests.[296]

Regarding the types of activities that can be subject to the exception, it is first and foremost evident that it is intended to be applicable to cases where all the prerequisites for a Government review under the proposal are met.[297] Beyond this, the proposal includes a discussion of the situations which have been considered to constitute *exceptional cases* within the meaning of Article 2(4) EIA Directive and therefore covered by the exemption.[298] Thus, the reasoning in SOU 2023:11 indicates that the investigation is aware that the exemption clause under the EIA Directive, and specifically the type of activities that might benefit from the exception, is to be interpreted restrictively.

On the other hand, when the exception clause under the EIA Directive was transposed into Swedish law through the provisional chapter, the European Commission sought clarification regarding the alignment of the Swedish law with Article 2(4) of the Directive and the Commission Guidelines.[299] Specifically, the Government was asked to clarify why the Cementa case constituted an exceptional case within the meaning of Article 2(4), why the circumstances of the case made it impossible to implement all the requirements of the Directive, what kind of other environmental assessment had been carried out, and how other applicable EU law, such as the Habitats Directive, had been considered.[300] No feedback has been received from the Commission following the submission of the requested additional information.[301] The report therefore seems to conclude the transposition of the exemption clause under the provisional chapter as in line with Article 2(4) of the EIA Directive.[302]

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[295] SOU 2023:11 (n 219) 92.
[296] ibid.
[297] ibid.
[298] ibid 91; For example, the need to ensure the security of electricity supply as confirmed in Case C-411/17, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL* (2019) ECLI:EU:C:2019:622, para 97.
[299] SOU 2023:11 (n 219) 91.
[300] ibid.
[301] ibid.
[302] ibid.

Furthermore, the formulation as to whether the derogation clause, as formulated in SOU 2023:11, would be applicable for the environmental assessment required for Natura 2000 permits is unclear. This is because according to the reasoning in SOU 2023:11, the exemption is to be applicable for specific environmental impact assessments and minor environmental impact assessments.[303] Under the Swedish Environmental Code, no difference is made in the terms depending on whether it concern an environmental assessment under the EIA Directive or the Habitats Directive, both are referred to as a specific environmental impact assessments.[304] A difference exists, however, in the scope of the assessments.[305] As SOU 2023:11 is drafted in Swedish where no differentiation between the terms of the environmental assessments is made, and no clear distinction is provided that the environmental assessment for Natura 2000 permits cannot be covered by the proposed derogation, it remains unclear how the proposed derogation from the requirement to carry out an EIA relates to Natura 2000 permits. The requirement of an appropriate assessment for activities that might have implications for the conservations objectives of a Natura 2000 site stems from Article 6(3) of the Habitats Directive. Thus, this is an obligation at EU level that Sweden is required to comply with.[306]

Another aspect of the proposal concerned that is not discussed in much depth is how an assessment of the environmental impact of an activity can be carried out despite not carrying out a complete EIA. In SOU 2023:11 it is noted that the Commission has stated that an alternative assessment can take a number of forms, without further elaborating on the type of assessments this could entail.[307] While the intention of the paucity may be to leave a wide margin of discretion to the Government to make decisions on the matter in each individual case, this may need to be clarified in the proposal, as the current reasoning is very vague in terms of how the alternative assessment should be evaluated.

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[303] ibid 89.
[304] SEC (n 192) chapter 6 para 20.
[305] Cf. SEC (n 192) chapter 6 paras 35 and 36.
[306] Consolidated Version of The Treaty on European Union [2012] OJ C 326/13 (TEU) 4(3); Consolidated Version of The Treaty of the Functioning of the European Union [2012] OJ C326/47 (TFEU) art. 288(3).
[307] SOU 2023:11 (n 219) 93.

4 Evaluating the Compatibility of the Proposal to Fast Track the Environmental Permit Procedure with the EU's Nature Protection Framework

4.1 Introduction

As an EU Member State, Sweden shall take any appropriate measure to ensure fulfilment of the obligations arising from EU law and refrain from any measures which could undermine the attainment of the EU's objectives.[308] Thus, the legislative proposals in SOU 2023:11 should be in line with the secondary legislation discussed, while concurrently aiming to achieve the overall objective of sustainable development.[309] Considering it could be ascertained that the balance between the different dimensions of sustainable development primarily materialize in the exemption clauses under the EU's nature conservation framework,[310] it is of relevance in answering the overarching research question of the thesis to assess whether the legislative proposals in SOU 2023:11 are in line with the relevant exemption clauses.

Therefore, in this chapter it will be analyzed whether the proposal to fast track the environmental permit procedure is compatible with the relevant EU secondary law and hence the objective of sustainable development. For this reason, the chapter will first analyze the proposals against the exemption clause under the EIA Directive. Secondly, the proposal will be assessed in the light of the concerned provisions under the Habitats Directive. Finally, it will be discussed whether it is relevant for the legal analysis that the proposal is intended to enhance Sweden's crises management.

4.2 The EIA Directive

The purpose of an EIA, as discussed above, is to integrate environmental aspects into planning and decision-making to promote sustainable development.[311] Thus, if no environmental assessment is carried out for an activity in line with the EIA Directive, sustainable development can be deemed not to be promoted, since the economic or social dimension has taken

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[308] Consolidated Version of The Treaty on European Union [2012] OJ C 326/13 (TEU) art. 4(3).
[309] I.e., Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L 26/1 (EIA Directive), Council Directive 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7 (Habitats Directive), and the objective of sustainable development under TEU (n 306) art. 3(3).
[310] See section 2.2.4.
[311] See sections 2.2.3.1. and 3.1.1.

precedence. However, this is provided that the activity in question does not fall within the scope of the exemption clause of the EIA Directive.[312] Therefore, to assess whether the legislative proposals in SOU 2023:11 promotes the overarching objective of sustainable development, it is pivotal to examine whether the proposals align with Article 2(4) of the EIA Directive.

The proposal aims to implement the derogation clause in a manner that the paragraph under Swedish law follows almost verbatim Article 2(4) of the EIA Directive.[313] Therefore, it is of primary relevance to identify to which types of projects the exemption clause under Swedish law would apply. Based on the Commission's understanding of the type of projects that fall within the scope of exceptional cases, it can be understood that the *urgency* of establishing the activity is the core issue.[314] However, the Commission emphasizes that even in circumstances where it is in the public interest to urgently establish an activity, the possibility for an exemption from the requirement to carry out an EIA should be interpreted narrowly.[315]

In the manner in which the exemption clause under the EIA Directive is intended to be transposed into Swedish law according to the proposals in SOU 2023:11,[316] the provision is primarily intended to apply to activities that contribute to Sweden's security of supply, and for which it is time-critical for the operator to obtain a permit.[317] The type of activities considered to fulfill this purpose are, according to SOU 2023:11, activities that meet all the requirements for a Government review under the same report.[318] With respect to the prerequisites for a Government review, it is on the one hand possible to ascertain that the definition of these terms under Swedish law fairly well reflects the type of activity to which the exemption clause is intended to apply. [319] This is because the proposal in SOU 2023:11 targets the societal function that an activity contributes to rather than the type of activity itself, and the societal functions

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[312] EIA Directive (n 309) art. 2(4).
[313] Cf. SOU 2023:11, 'Tillfälligt miljötillstånd för samhällsviktig verksamhet – för ökad försörjningsberedskap' (24 February 2023) 89 and EIA Directive (n 309) art. 2(4).
[314] Notice of the Commission, 'Guidance document regarding application of exemptions under the Environmental Impact Assessment Directive (Directive 2011/92/EU of the European Parliament and of the Council, as amended by Directive 2014/52/EU) – Articles 1(3), 2(4) and 2(5)' (14 November 2019) para 3.7.
[315] ibid.
[316] SOU 2023:11 (n 313) 92.
[317] ibid 30 and 92.
[318] See section 3.2.1.
[319] See definitions of the terms under sections 3.2.1.1 and 3.2.1.2; Notice of the Commission (n 314) para 3.7; Case C-411/17, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL* (2019) ECLI:EU:C:2019:622, para 97.

and interests discussed in the proposal are in substantial alignment with what is outlined in the Commission's guidance on how to interpret the exemption provision.[320]

On the other hand, the Cementa case is repeatedly used as an example of why the relevant piece of legislation should be introduced. Neither SOU 2023:11 nor investigator Pär Malmberg when specifically asked,[321] explicitly state that the exemption to the requirement to carry out an EIA as proposed in SOU 2023:11 would apply to cement production or the case of Cementa. However, the line of reasoning in SOU 2023:11, but more specifically the Government bill in preparation for the provisional chapter of the Environmental Code, arguably indicates that if the same situation that arose with Cementa were to arise again, that situation would possibly fall within the scope of the exemption clause as formulated in SOU 2023:11. This is because it was made apparent by the Government in the Cementa case that Sweden has a social and economic interest in maintaining a domestic cement production, which is why the activity in question was classified as a national interest, where the closure of the activity for failure to obtain a permit would have led to significant socio-economic consequences for Sweden.[322]

However, what is classified as an essential public activity of national interest at Member State level and thus qualifies for the derogation under the EIA Directive may not be considered legitimate at EU level. An instance when the CJEU has addressed the relationship between interests at Member State level and EU level is in the case *C-121/21 R*.[323] The case concerned an open-cast lignite mine located on Polish territory close to the borders of the Czech Republic, where the Czech Republic considered the granting of development consent to infringe EU law in several respects.[324] According to the CJEU, Poland had failed to adequately demonstrate that the cessation of lignite mining at the mine concerned would constitute a genuine threat to Poland's energy security, to the supply of electricity to consumers, or to cross-border exchanges

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[320] I.e., the Commission mentions activities such as the supply of electricity and activities to satisfy strategic interest in renewable energy where a failure to carry out these activities urgently would have been against the public interest and would have threatened political, administrative or economic stability and security, while SOU 2023:11 mentions activities that serve the maintenance and manufacture of such raw materials and products necessary for health care, infrastructure, and energy supply, where the deployment of these activities relates to interests of importance for the development of society, or regional and employment policy interests.
[321] Johanna Alskog, 'Utredare föreslår en permanent lex Cementa' *Altinget* (7 March 2023) <https://www.altinget.se/miljo/artikel/utredare-foreslaar-en-permanent-lex-cementa> accessed 25 March 2024.
[322] Prop. 2021/22:15, 'Regeringsprövning av kalkstenstäkter i undantagsfall' (21 September 2021) 22.
[323] Case C-121/21 R, *Czech Republic v Republic of Poland* (2021) ECLI:EU:C:2021:420.
[324] ibid.

of electricity.[325] The Court further explained that the socio-economic interests invoked by Poland cannot take precedence over considerations relating to the environment and human health.[326]

The reasoning by the CJEU in the case concerned thus suggests that Sweden must be able to convincingly demonstrate the public interest at Member State level of an activity. Additionally, although such an interest is present, it may not prevail over the protection of the environment or human health, these being interests protected at EU level. Activities previously considered to constitute an exceptional case within the meaning of Article 2(4) EIA Directive have concerned, for example, the security of electricity supply, which ought to be classified as a basic human need. If Sweden is to justify the social and economic public interest of, for example, cement production, this must be deemed an interest that require more extensive justification by the Member State in question. This is particularly evident when considering that cement is major source of CO_2 emissions contributing significantly to climate change,[327] thereby interfering with the EU's interest in protecting the environment and human health, while it can hardly be considered to constitute a basic human need. Thus, it is questionable whether cement production is a type of activity considered to fall within the exemption clause under the EIA Directive at EU level.

Furthermore, the prerequisite of no satisfactory alternatives, as defined under SOU 2023:11, is an aspect that merits greater scrutiny.[328] It could be established that this is an aspect of primarily political nature, where it is necessary to determine whether there exists an acceptable alternative from a public point of view.[329] According to SOU 2023:11, the core of the assessment should focus on whether the activity can be substituted by other activities or imports from other countries and the exemption should not apply to activities where the operator is considered to have had time to apply for a permit under the regular permit procedure.[330] From one standpoint,

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[325] ibid para 92.
[326] ibid.
[327] Edwin Woerdman, Martha Roggenkamp, and Marijn Holwerda, *Essential EU Climate Law* (2nd edn, Edward Elgar Publishing Limited 2021) 157; I International Energy Agency, 'Energy Technology Perspectives' (September 2020) 215.
[328] See section 3.2.1.4.
[329] SOU 2023:11 (n 313) 63.
[330] ibid.

these elements appear to provide a reasonable benchmark for determining whether there are satisfactory alternatives available.

From another standpoint, the Government did not consider that there were any satisfactory alternatives available in the Cementa case.[331] The analysis in the Cementa case follows the prerequisites presented above and explains in reasonable detail why cement as a raw material could not be substituted at the time being; why no other operator in Sweden could take over for Cementa's activity on Gotland; and why imports of cement could not be a replacement for Cementa's production.[332] However, the reasoning in question may be considered slightly incomplete as it appear that Cementa would never obtain a permit again; whereas the reality being that the permit application was denied as the Land and Environmental Court of Appeal found the EIA conducted by Cementa to constitute a procedural hindrance.[333] Since the Government recognized Sweden's reliance on imported cement and the presence of other operators in the national market, it is noteworthy that there is no further discussion on whether cement production could be *temporarily* substituted by imports or other operators, while Cementa complied with its application for a permit in accordance with the requirements set by the Court.

Therefore, if the factors to be considered by the Government when deciding on satisfactory alternatives according to SOU 2023:11 are applied in the same manner as in the Cementa case, it is debatable whether these factors are sufficient to meet the requirements at EU level. This is because the Commission has declared that the *urgency* of establishing an activity is one of the fundamental factors in assessing the scope of the exemption clause under the EIA Directive.[334] Thus, if an activity can be temporarily replaced by other operators or imports while awaiting a permit decision, it can hardly be characterized as urgent.

Based on the analysis above, it is evident that the proposed implementation of the derogation clause from the EIA Directive into Swedish law, as described in SOU 2023:11, is in line with the wording of Article 2(4) of the Directive. Indeed, the decisive factor affecting the promotion

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[331] Prop. 2021/22:15 (n 322) section 13.4.
[332] ibid.
[333] Land and Environment Court of Appeal [Mark- och miljööverdomstolen] case no M 1579-20 (6 July 2021) 41.
[334] Notice of the Commission (n 314) para 3.7.

of sustainable development lies in the application of this clause by the Government. Given the CJEU's stance of interpreting the derogation restrictively, it is of the utmost importance that the exemption from the requirement to carry out an EIA in Swedish law is applied in line with and to activities that comply with the strict interpretation. In this way, it can be considered that the ecological aspect of sustainable development is not compromised to prioritize economic or social interests.

4.3 The Habitats Directive

The possibility for the Swedish Government to review permit applications as proposed in SOU 2023:11 shall also apply for Natura 2000 permits.[335] Therefore, it is of relevance to assess whether the proposals are in line with the provisions under the Habitats Directive. As noted earlier,[336] the protection regime for Natura 2000 sites under the Habitats Directive seeks to maintain a high level of protection for the environment and biological biodiversity.[337] Meanwhile, the balance between the different elements of sustainable development is promoted by the derogation clause under Article 6(4) of the Habitats Directive, allowing imperative reasons of overriding public economic and social interests to be weighed against the conservation objectives for the site in question.

The difficulty with this part of the analysis is the lack of clarity in SOU 2023:11 as to how the exception to the requirement to carry out an environmental assessment relates to the obligation of an appropriate assessment under the Habitats Directive.[338] This is because while Article 6(3) of the Habitats Directive requires an appropriate assessment to be carried out for any project or plan likely to have a significant effect on the Natura 2000 site concerned in accordance with the precautionary principle, the derogation clause in Article 6(4) is only invokable after the impacts on the site concerned has been identified, through the appropriate assessment.[339] The CJEU has further expressed that activities that may have an impact on a Natura 2000 site shall be subject to an assessment under Article 6(3) of the Habitats Directive even if the activity can be exempted under Article 2(4) of the EIA Directive.[340] Thus, if SOU 2023:11 proposes an

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[335] SOU 2023:11 (n 313).
[336] See section 2.2.3.2.
[337] Habitats Directive (n 309) arts. 6(2) and 6(3).
[338] See discussion under section 2.2.3.2.
[339] Case C-304/05, *Commission v Italy* (2007) ECLI:EU:C:2007:532, para 83.
[340] Case C-411/17, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL* (n 319) para 145.

exception to the appropriate assessment under Article 6(3) of the Habitats Directive, this is automatically in contradiction with Sweden's obligations under the Habitats Directive.

Therefore, it would be reasonable to assume that the exemption to an environmental assessment as proposed in SOU 2023:11 only applies to an environmental assessment as required under the EIA Directive, and that the requirement for an appropriate assessment deriving from the Habitats Directive remains. However, prior to the adoption of the provisional chapter of the Environmental Code in the Cementa case, it was questioned whether the exemption from the EIA requirement was compatible with Article 6(3).[341] Although this objection was not extensively addressed in the Government bill, it was emphasized that it is necessary, in the event that a Natura 2000 permit is to be reviewed, that an assessment of the environmental impacts of the activity must be possible even if a complete EIA is not carried out.[342] Furthermore, preceding the granting of the permit in the Cementa case, the Swedish Environmental Protection Agency invoked that it is not legitimate, on the basis of Article 2(4) of the EIA Directive, to grant an exemption from the appropriate assessment required under Article 6(3) of the Habitats Directive.[343] Although the Government had an opportunity in the decision to clarify how the implementation of the derogation under the EIA Directive relates to the requirements for an environmental assessment stemming from Article 6(3) of the Habitats Directive, the decision is silent on this issue. The omission to clarify that the exemption from conducting an EIA does not exempt the environmental assessment needed for activities impacting Natura 2000 sites could be considered a mistake once, perhaps even twice, but certainly not thrice.

On the other hand, following the argument made by the Government in its bill for the Cementa case,[344] the proposal in SOU 2023:11 likewise implies that an assessment of the environmental impact of the activity must be conducted despite the exemption of carrying out a complete EIA.[345] Thus, it is possible to interpret the wording of the proposal as meaning that an assessment of the impacts of the activity on a Natura 2000 permit must always be made. In this

[341] Prop. 2021/22:15 (n 322) 34.
[342] ibid 36.
[343] Regeringsbeslut, 'Ansökan om tillstånd enligt miljöbalken till täkt av kalksten i Slite, Gotlands kommun; nu fråga om undantag från krav på miljöbedömning' doc no M2021/01774 (delvis) (3 November 2021) 3.
[344] Prop. 2021/22:15 (n 322) 36.
[345] SOU 2023:11 (n 313) 89.

regard, however, particular reference should be made to the fact that an appropriate assessment within the meaning of Article 6(3) of the Habitats Directive 'implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field.'[346] Subsequent to the appropriate assessment, Member States may only permit an activity if no reasonable scientific doubt remains as to whether the activity will adversely affect the integrity of the Natura 2000 site concerned.[347] Therefore, it is difficult to envisage how the provision in SOU 2023:11, which establishes that an exception to the requirement for an EIA presupposes that an assessment of the environmental impact of the activity can nevertheless be made, can replace the strict requirements established by the CJEU concerning what the environmental assessment for Natura 2000 sites shall encompass.

Therefore, it can be concluded that the proposal to introduce an exemption to the requirement for an environmental assessment in SOU 2023:11 extends to the appropriate assessment required for activities that might affect a Natura 2000 site. Consequently, the proposed exemption clause in SOU 2023:11 cannot be considered compatible with Article 6(3) of the Habitats Directive. Accordingly, in the absence of an assessment of the environmental impacts and given the derogation clause of the Habitats Directive can only be triggered after an assessment in line with Article 6(3) has been carried out, it can be ascertained that the proposal in SOU 2023:11 is not compatible with the overarching objective of sustainable development.

4.4 Evaluating the Proposals in Times of Crisis

Another aspect to consider is that the proposals in SOU 2023:11 are intended to accommodate Sweden's permit procedure for environmental permits in extraordinary situations.[348] In this regard, it must be recalled that the EU has adopted certain provisions following recent crises, such as Russia's invasion of Ukraine. [349] This pertains to previously discussed aspects, i.e., that the Renewable Energy Directive allows for an *a priori* environmental assessment in renewable energy acceleration areas and that the construction and operation of renewable energy sources are presumed to serve an overriding public interest when balancing legal interests in individual

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[346] Case C-127/02, *Waddenvereniging and Vogelbeschermingsvereniging* (2004) ECLI:EU:C:2004:482, para 54.
[347] ibid para 59.
[348] SOU 2023:11 (n 313) 29.
[349] See for example: Communication of the Commission, 'REPowerEU Plan' (18 May 2022) COM(2022) 230 final.

cases under, *inter alia*, Article 6(4) of the Habitats Directive.[350] These aspects indicates that there might be room for more flexibility, according to EU law, in the event of a crisis.

However, although the above examples under the Renewable Energy Directive suggest that the EU recognizes the importance of responsive measures in times of crisis, both examples also demonstrate the importance, according to EU law, of assessing the environmental impacts of an activity. This is because despite that a project-specific EIA can be exempted in renewable energy acceleration areas, it is nevertheless required that the environmental impacts are examined through an *a priori* environmental assessment before an area is classified as such.[351] Additionally, even though renewable energy projects shall be considered an overriding public interest within the meaning of Article 6(4) Habitats Directive,[352] this presupposes that an appropriate assessment of the impacts on the Natura 2000 site in question has been carried out in line with Article 6(3). Therefore, while the EU has an economic and social interest in developing more renewable energy urgently,[353] the necessity to balance those interests with the interest of protecting the environment through the assessment of environmental impacts of an activity is still recognized, thus fostering the objective of sustainable development.

In this respect, it is also relevant to consider the principle of proportionality, constituting a general principle of EU law.[354] In the *Puglia* case, the CJEU allowed for the prohibition of wind power installations of a certain size on Natura 2000 sites without any prior assessment of the project on the site concerned, but recognized the importance of national courts assessing the proportionality of the measures.[355] What distinguishes the *Puglia* case from the legislative proposals in SOU 2023:11 is that the former concern a national law providing stricter protection for the environment, while the latter potentially weakens environmental safeguards by exempting operators from conducting an EIA. This is relevant as Article 193 TFEU provides

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[350] Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 [2023] (Renewable Energy Directive) arts. 15(c) and 16f.
[351] ibid art. 15(c)(2).
[352] ibid art. 16f.
[353] REPowerEU Plan (n 349) 1.
[354] TEU (n 308) art. 5(4); Case C-331/88, *Fedesa and Others* (1990) ECLI:EU:C:1990:391, para 13.
[355] Case C-2/10, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* (Puglia) (2011) ECLI:EU:C:2011:502, para 74.

that Member States may adopt more stringent protective measures when implementing directives adopted under EU environmental policy, but not vice versa.

Given that both the EIA Directive and the Habitats Directive are based on Article 192(1) TFEU, it must be considered reasonable that any exceptions to its provisions in national law are formulated and interpreted in such a way as to achieve the least interference with the protection of the environment to be considered proportionate, even in times of crisis.[356] The fact that the need to adapt to crises will not allow Member States to completely disregard environmental protection is also consistent with the inter-generational aspect of sustainable development, as formulated by the Brundtland report and adopted by the EU; namely that the needs of future generations must be safeguard despite prevailing short term economic or social interests for the present generation.[357] The possible primacy of the ecological aspect over pressing economic or social interests resulting from a crisis can further be supported by Winter's argument concerning the ecological basis of sustainable development and our critical dependence on the biosphere for human survival.

In a nutshell, while the need to adapt to crises may require flexibility, it is imperative that Member States uphold environmental protection as a priority. What is evident with respect to the EU rules adopted to adapt the regulatory framework to exceptional situations is that new approaches are being explored, rather than simply exempting Member States from requirements intended to protect the environment, thus maintaining the ecological dimension of sustainable development. Although Sweden has an interest in being able to better manage crises by adopting an exemption clause to expedite the permit procedure for certain activities, it is essential that the proposals in SOU 2023:11 still strive to achieve a high level of protection for the environment, to be considered in line with the EU's implementation of sustainable development.

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[356] See the Court's reasoning regarding the principle of proportionality in for example Puglia case (n 355) para 73.

[357] World Commission on Environment and Development, 'Our Common Future', UNGA doc. A/42/427 (Brundtland Report) para 27; Communication of the Commission, 'Next steps for a sustainable European future European action for sustainability' (22 November 2016) COM(2016) 739 final; Communication of the Commission, '2003 Environment Policy Review: Consolidating the Environmental Pillar of Sustainable Development' (2 February 2004) COM(2003) 745 final/2.

5 Concluding Remarks

The scrutiny of the proposal to fast track the Swedish environmental permit procedure disclose that the proposals in SOU 2023:11 potentially contradicts Sweden's obligations under the EU's nature protection framework. Being in potential conflict with the EU's nature protection framework, drafted to attain the overarching objectives of the EU, the proposals further risks to undermine the objective of sustainable development. The emphasis on the potential infringement of Sweden's EU law obligations is mainly due to two aspects that have been established throughout this thesis

The first aspect depends on the type of activities to which the exemption to carry out an EIA will apply. This is on the grounds that the formulation of the suggested implementation does not conflict with the wording of Article 2(4) of the EIA Directive. Rather, this is because Sweden previously applied the exemption to cement production, arguably not a legitimate aim according to how the provision has been applied at EU level. Thus, Sweden can be considered in line with its obligations under the EIA Directive and the objective of sustainable development only if the activities exempted under the proposed derogation clause are in line with the EU's interpretation of the scope of Article 2(4) of the EIA Directive.

The second aspect relates to whether the exemption to carry out an EIA also includes the requirement to examine potential environmental effects on Natura 2000 sites. If the proposed exemption in SOU 2023:11 is applied in such a manner, this would inherently contradict both Article 6(3) of the Habitats Directive and hence the objective of sustainable development. Accordingly, to comply with its EU law obligations, it should be clarified, before the Swedish Government bring forward its bill, that an environmental assessment in line with Article 6(3) of the Habitats Directive is required for all activities that is likely to have a significant effect on the site concerned, regardless of whether the activity at issue qualifies for an exemption from the requirement to carry out an EIA under Article 2(4) of the EIA Directive.

However, the proposal to fast track the environmental permit procedure for essential public activities is intended to facilitate Sweden's capacity to handle crises. On the one hand, the importance of responding to social and economic interests in times of crises in the pursuit of sustainable development has been demonstrated throughout this thesis. By reviewing recent developments at EU level, such as the amended Renewables Energy Directive, it could be

established that the EU has strived to develop alternative solutions on how nature protection can be maintained despite the need to modify or circumvent certain rules in times of crisis. Thus, given the turbulent global events during recent years, as well as the recent developments at EU level, Sweden's proposal to explore new approaches for the environmental permit procedure to urgently be able to deploy essential public activities in times of crisis is not entirely unreasonable.

On the other hand, the research carried out in this thesis has been able to illustrate that the proposal to fast track the Swedish environmental permit procedure, albeit only applicable in times of crisis, potentially fails to maintain the environmental protection required by EU law to be considered in line with sustainable development. If the aim of the proposal is to compromise strict environmental protection requirements in favor of social and economic interests in times of crisis to achieve a balance between the different dimensions of sustainable development, alternative solutions with the least possible environmental impact to achieve the objective should have been explored. These alternatives could include, *inter alia*, requiring an *a priori* environmental assessment instead of a project-specific EIA for essential public activities, as practiced at the EU level for renewable energy projects. However, considering the proposals in SOU 2023:11 essentially simply relieve operators from the requirement to assess the environmental impacts of an activity, it is indeed doubtful that the proposals does not exceed what is necessary to achieve the objective with the proposal, in line with the principle of proportionality.

In summary, the research undertaken by this thesis indicates that while the concept of sustainable development was introduced nearly 40 years ago, difficulties remain in how to effectively balance between the three dimensions of sustainable development in practice. While Winter argued that the ecological dimension must serve as the foundation for sustainable development, the proposal to fast track the Swedish environmental permit procedure can be considered a textbook example of when the ecological dimension potentially is neglected in favor of short term economic or social interests. Therefore, it will be interesting to observe whether the proposals presented in SOU 2023:11 will be submitted as a bill to the Swedish Parliament and if any of the challenges raised in this thesis will be addressed accordingly.

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