The EU Nature Restoration Law:

Legal concerns on the trilogue draft agreement

SERE Legal Working Group[1]

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1. Overall assessment

The draft agreement of 11 November 2023 on the Nature Restoration Law (NRL) resulting from the trilogue negotiations, weakens the Commission proposal of 22 June 2022 in several instances. However, contrary to the European Parliament amendments of 12 July 2023 which largely undermined the NRL, the agreed text is a more balanced proposal and provides a legal basis for upscaling nature restoration within the EU.

Without doing a full analysis of the draft agreement, we provide some legal concerns below.

2. Legal concerns

2.1. New article 4, § 1, a & b (exception on 'very common and widespread habitat types'): a reduced level of protection

A derogation is provided for 'very common and widespread habitat types'. Member States can invoke this derogation 'when duly justified'. The new provision fails to clarify that only ecological and not economic reasons can be used to justify the application of this clause. Additional guidance could be provided in the preamble.

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Additionally, the provision guarantees that the application of this derogation clause should not block the achievement of the good conservation status of the habitat types that fall under the scope of the EU Habitats Directive. In accordance with article 37 of the European Charter of Fundamental Rights,[2] the EU Nature Restoration Law should indeed not establish a level of protection lower than the Habitats Directive. Yet the question remains whether the phrase 'achieved or maintained at the national or biogeographical level' might not lead to misunderstandings. Every site should contribute to the achievement of the favourable conservation status.[3]

2.2. Article 4, § 6-7 (non-deterioration): guidance on 'significant' required

The non-deterioration obligation for restored habitats (article 4, § 6) and non-deterioration of Annex I habitat types (article 4, § 7) is now limited to 'significant' deterioration, without prejudice to the non-deterioration provision in the Habitats Directive. In light of legal certainty and ensuring a level-playing field, it is advisable that the Commission provides guidelines on what 'significant' deterioration means or provide examples of 'non-significant' deterioration.

2.3. New article 4, § 7a (exception to non-deterioration): risk of *paper* compensation

According to this new provision, Member States can invoke an exception to the non-deterioration provisions and apply non-deterioration at the biogeographical level of the Member State. Although this provision only applies outside Natura 2000, in light of legal clarity, it would be useful to align the non-deterioration clause of the NRL with the non-deterioration clause of the Habitats Directive, which is at site level.

The exception on the non-deterioration clause requires compensation (according to article 12, § 2ca of the draft agreement). It is however unclear how this compensation will be possible in case other areas are also in an unfavourable conservation status (which is the case for many habitats). Compensation is, according to the mitigation hierarchy, always the very last option. There is no guarantee or safeguards in this new clause that compensation will provide the same ecosystem functions and will not be merely a *paper* compensation. Moreover, the provision does not consider that several habitat types can not be compensated by their nature and centuries of ecological development (e.g., old-growth forests and grasslands, healthy peatlands).

2.4. Article 4, § 9 (exceptions): normative incoherence

Article 4, § 9 provides exceptions to the restoration and non-deterioration obligations. The text has been changed from 'For Natura 2000 sites' to 'Within Natura 2000 sites'. The change 'within' Natura 2000 sites' for article 4, § 9, c is contradictory to article 6, § 3-4 of the Habitats Directive: these articles apply also to plans and projects outside Natura 2000, with an impact on Natura 2000 sites.

2.5. Article 9 (agricultural ecosystems): undermining the objectives of the law

It is very positive that the provision on agricultural ecosystems has been re-introduced in the draft agreement after it was completely deleted in the Parliament's amendments. However, it still substantially weakens the Commission proposal.

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[2] A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

[3] European Commission, Directorate-General for Environment, Managing Natura 2000 sites – The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, Publications Office, 2019, 16.

Article 9, § 4 on rewetting of drained peatlands provides a new clause: "The obligation for Member States to achieve the rewetting targets set out in paragraph 4(a), 4(b), 4(c) does not imply an obligation for farmers and private landowners to rewet their land, for whom rewetting on agricultural land remains voluntary, without prejudice to obligations stemming from national law". This clause transforms the (formal) regulation into a (material) directive on the point of rewetting. If the Member States want to respect the duty to put in place restoration measures consisting of rewetting in agricultural land, they must adopt national legislation obliging the farmers to do so. This seems to be an abuse of procedure as regulations are directly applicable and do not require transposition. It is contrary to the obligations under the Paris Agreement, EU climate law and other international and EU obligations.

The exception on rewetting peatland, because of 'significant negative impacts on infrastructure, buildings, climate adaptation or other public interests' is vague, unnecessarily broad and holds the risk that it will undermine the objectives of the NRL. It is unclear what is meant by climate adaptation in this context. The paragraph seems to suggest that rewetting should be prioritized on other (than agricultural) peatlands, yet this is somehow paradoxical.

2.6. Article 11, § 5b (financing): inconsistent behaviour

According to this new article the implementation of this Regulation shall not imply an obligation for Member States to re-programme any funding under the Common Agricultural Policy, the Common Fisheries Policy or other agricultural and fisheries funding programmes and instruments under the multi-annual financial framework 2021-2027. This provision disregards the findings on the lack of efficiency of CAP-funding for more environment- and climate-friendly practices, including several reports from the EU Court of Auditors.[4]

This article is against the spirit of the long-term budget and next-generation EU €1.8 trillion package to help build a greener, more digital, and more resilient Europe.[5] Legally speaking this is inconsistent behaviour, "venire contra factum proprium" or abuse of rights.

2.7. Article 22a (emergency brake): unbalanced provision

This is a far-going exception and has never been used before in EU environmental legislation. In times of an increasing climate and biodiversity crisis, measures should rather speed up than slow down the implementation of legislation, in light of obligations under international and EU biodiversity and climate law and insufficient progress by Member States to reach these obligations. To bring a more balanced proposal, we suggest adding a second part to this article, through an **emergency accelerator**:

Where exceptional and unprovoked environmental or climate disaster events are occurring, with severe consequences for human health or ecosystem health, the Commission shall adopt implementing acts that are both necessary and justifiable in the emergency to shorten the deadlines and widen the restoration goals of the Regulation. Such implementing acts may temporarily speed up the application of the relevant provisions of this Regulation to the extent and for such a period as is strictly necessary. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 21(2).

[4] See: European Court of Auditors, Biodiversity on farmland: CAP contribution has not halted the decline, European Union, 2020; European Court of Auditors, Common Agricultural Policy and climate. Half of EU climate spending but farm emissions are not decreasing, European Union, 2021.

[5] https://commission.europa.eu/strategy-and-policy/recovery-plan-europe_en