

Draft recommendation on clarification of obligations regarding the conservation of Emerald Network sites

44th Meeting of the Bern Convention Standing Committee
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Prior steps

2020

- Legal analysis (T-PVS/PA(2020)7)
- GoEPAEN
- SC: calls for proposals to complement the legal framework

2021

- Follow-up document on possible next steps (T-PVS/PA(2021)01)
- Consultation of Contracting Parties on possible next steps (T-PVS/PA(2021)02)
- Consultation of GoEPAEN on possible next steps (T-PVS/PA(2021)09)
- SC: notes preference for further clarification of legal framework & calls for additional consultation of problems and challenges faced in implementation, including in context of case-files

Prior steps (2)

2022

- Only one response to third consultation
- SC: calls on Parties to respond, notes importance of developing further guidance on the legal framework, and calls on GoEPAEN to give this “highest priority”

2023

- Several further responses to third consultation

2024

- GoEPAEN: calls for SC recommendation concisely reiterating the binding and non-binding obligations of parties & identifying requirements that may require development of further guidance
- Draft recommendation drafted, circulated, and revised in light of comments

Outcomes of consultations

Consultations of Contracting Parties (2021, 2022-2023) & GoEPAEN (2021):

- Significant support for adopting clear statement, in a **single brief document**, of **what can presently be stated with confidence**, based on the Convention and current Resolutions and Recommendations, about the **obligations** of parties regarding Emerald Network sites, distinguishing clearly between binding and non-binding commitments
- Significant support for **further clarification** of **currently unclear aspects** of legal framework as such, but no agreement on **what aspects** to prioritize
- No consensus yet regarding **further alignment with Natura 2000** regime

Outcome of GoEPAEN (2024)

Two-step approach:

1. “prepare a document bringing together in an accessible language binding and non-binding obligations and outlining unclear aspects of requirements of the legal framework”
2. “prepare detailed guidance documents on currently unclear requirements”

Decision:

“The participants in the [GoEPAEN] welcomed the conclusions of the survey ... and mandated the Secretariat to prepare a **draft recommendation** wrapping up in an **accessible** language **binding and non-binding obligations** of Contracting Parties towards the Emerald Network and outlining **unclear requirements** for the consideration of the 44th Standing Committee.”

Documents

- *Obligations of Bern Convention Parties regarding the conservation of candidate and adopted Emerald Network sites: a legal analysis – T-PVS/PA(2020)7*
- *Future work on the legal framework of the Emerald Network – possible next steps – T-PVS/PA(2021)01*
- *Outcomes of the consultation of Contracting Parties on how to follow up on the conclusions of the 2020 legal analysis – T-PVS/PA(2021)02*
- *Outcomes of the written consultation of the participants in the GoEPAEN: proposals for further elaborating the legal framework of the Emerald Network and aspects to focus on – T-PVS/PA(2021)09*
- *Challenges and problems faced by Contracting Parties with the implementation of the Emerald Network – possible solutions – T-PVS/PA(2024)03*
- *Draft recommendation on the further clarification of the obligations of Contracting Parties regarding the conservation of Emerald Network sites – T-PVS/PA(2024)11rev*

Draft recommendation

Overview:

- Recalls background
- Identifies & categorizes current commitments:*
 - legally binding
 - legally binding depending on the circumstances
 - not legally binding
- Identifies aspects of legal framework to be clarified further

** reiterates pre-existing commitments; does not change or add to them.*

Draft recommendation

Commitments – legally binding:

Article 4 + Resolutions No. 1 (1989), No. 4 (1996), No. 6 (1998):

Obligation of **result** regarding candidate and adopted Emerald Network sites:

- take those **measures** which are **necessary** and **able** to effectively **ensure** the conservation of the habitats involved
- do what it takes, and whatever works, to **maintain/restore** the **abiotic** and **biotic** features which form the habitats involved

Exceptions: **Article 9**

Draft recommendation

Commitments – legally binding depending on the circumstances:

Measures needed to meet obligation of result will **vary**, but will **normally** include:

- Site protection regime
- Site management measures
- Monitoring
- Anticipating and responding to specific threats
 - screening
 - timely and comprehensive impact assessment
 - authorising only activities compatible with conservation

Draft recommendation

Commitments – not legally binding:

Conducive to aims of Convention and effectiveness of Emerald Network, but not strictly necessary to comply with Article 4:

- Report every 6 years
- Inform Secretariat of “important changes likely to affect negatively in a substantial way the ecological character” of sites

Draft recommendation

Aspects to further clarify/concretize in additional guidance:

- Nature of result to be achieved under Article 4
- Nature of required site management measures
- Screening, assessment and authorization of projects
- Requirements regarding monitoring and reporting
- Scope for exceptions under Article 9

The End

(optional further slides below)

Legal study (2020) – obligations re Emerald Network sites

Binding:

- Convention provisions (Article 4, Article 9)

Non-binding – *but influencing **interpretation** of Convention provisions:*

- Resolutions 1, 3, 4, 5, 6, 8 (habitat conservation, Emerald Network)
- Recommendations 14, 15, 16, 25, 157, 172, 207, 208 (id.)
- Recommendations 1, 2, 8, 9, 12, 13, 23, 24, 32, 42, 54, 63, 83, 97, 98, 108, 110, 111, 112, 113, 117, 130, 131, 144, 184, 201, 202 (specific sites / issues)
- Guidance documents

Comparison with Natura 2000 obligations

Similar:

- Article 4 BC obligation of result essentially similar to Article 6 HD

Different:

- Certainty required for authorisation of projects (Article 6(3) HD)
- Conditions for exceptions (Article 6(4) HD):
 - Only for “imperative reasons of overriding public interest”
 - Compensatory measures

Article 4

“1. Each Contracting Party **shall** take **appropriate** and **necessary** legislative and administrative **measures** to **ensure** the **conservation** of the habitats of the wild flora and fauna species, especially those specified in Appendices I and II, and the conservation of endangered natural habitats.

2. The Contracting Parties in their planning and development policies shall have regard to the conservation requirements of the areas protected under the preceding paragraph, so as to avoid or minimise as far as possible any deterioration of such areas.

3. The Contracting Parties undertake to give special attention to the protection of areas that are of importance for the migratory species specified in Appendices II and III and which are appropriately situated in relation to migration routes, as wintering, staging, feeding, breeding or moulting areas.

4. ...”

Resolution No. 1 (1989)

“For the purpose of improving the effectiveness of the convention, the terms listed hereunder are to be interpreted as follows:

For the purpose of Article 4:

- a. ‘**necessary** measures’ means in particular those measures which are **required**:
 - i. to **ensure** the **conservation** of the habitats of those species which have been identified by the Standing Committee ... as requiring specific habitat conservation measures ...;
 - ii. to **ensure** the **conservation** of those natural habitats which have been identified by the Standing Committee ... as ... requiring specific conservation measures;”

Resolution No. 1 (1989)

- b. ‘**appropriate** measures’ means in particular those measures ... which are **able to ensure** the conservation of the habitat of particular species or of particular natural habitats;
- c. ‘**conservation**’ means the **maintenance** and, where appropriate, the **restoration** or improvement of the **abiotic and biotic features** which form the habitat of a species or a natural habitat ... and includes, where appropriate, the control of activities which may indirectly result in the deterioration of such habitats ...”

Consultation outcomes (2021)

Contracting Parties (19 responses, incl. 9 non-EU)

- 8 parties -> further clarification, e.g., brief document based on 2020 report
- 12 parties -> (also) further development, aligning closer with Natura 2000 rules

GoEPAEN participants (9 responses)

- Consolidation & further clarification

Third consultation (2022-2023) – question

“Non-EU Contracting Parties are kindly asked to identify what **problems or challenges** they face with **implementing** relevant elements of the Bern Convention and other measures in place for Emerald Network sites, including in the frame of case-files,” especially regarding the following:

- Results to be achieved under Article 4
- Monitoring and reporting
- Site protection status
- Site management measures
- Assessment and authorisation of projects
- Making exceptions under Article 9 of the Convention
- Other aspects

“In other words, what particular problems or challenges (if any) have you experienced with respect to the above elements, and which of these do you consider most important?”

Third consultation (2022-2023) – outcomes

United Kingdom:

- Elaborate analyses
- Info on Emerald Network regime “scattered across numerous Resolutions and Recommendations”; “no single document”; “very difficult for Parties to understand the full extent of what is required to fulfil obligations under Article 4”
- “Further work should be undertaken to clarify requirements and provide guidance to Parties”; preferably in “one easily accessible document” that is regularly updated
- 5-year period for implementing revised guidance, followed by evaluation
- Case-files: “lack of a clear process to follow”; also need for “mechanism for drawing long-standing and intractable cases to a close”

Third consultation (2022-2023) – outcomes

Georgia:

- Lack of financial and human resources for systematic monitoring
- Suggests guidance document on ‘favourable conservation status’
- Calls for resolution (or brief, clear guidance document) that “recapitulates and confirms the requirements of parties, clearly distinguishing between binding and non-binding provisions”

Iceland:

- Lack of human resources with relevant expertise
- Requirements spread across Convention, Resolutions, Recommendations and other documents: “difficult for parties to apply the requirements consistently and coherently”

Third consultation (2022-2023) – outcomes

Norway:

- Requirements spread across many documents, making it “quite overwhelming to figure out what is most important,” and difficult to determine precisely what is “good enough or necessary” to comply
- Calls for Resolution or Recommendation to “streamline the requirements in a simplified language,” clearly distinguishing binding and non-binding ones
- Seeks confirmation that site management measures are required “as appropriate” (e.g., lesser requirements for common species)

Serbia:

- Financial and human capacity limitations impede systematic monitoring (while latter is crucial for, e.g., proper operation of Article 9 derogation procedure)

Third consultation (2022-2023) – key recommendation

Single, concise document plainly indicating requirements regarding Emerald Network sites, distinguishing clearly between binding and non-binding ones (UK, Georgia, Iceland, Norway)

Format:

- Resolution (Georgia, Norway)
- Recommendation (Norway)
- Guidance document (UK)